**D & D Enterprises, Inc. d/b/a Beltway Transportation Company *and* Drivers, Chauffeurs & Helpers Local Union No. 639 a/w International Brotherhood of Teamsters, AFL–CIO.** Case 5–CA–22170

October 1, 2001

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On October 31, 1995, the Board issued a decision in this case[1] in which it found, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate economic strikers Jimmy Williams and David Johnson to their former jobs as regular run drivers and by subsequently discharging them. The Board also found that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union at a time when it lacked objective evidence that the Union had lost the support of a majority of unit employees. To remedy these unfair labor practices, the Board ordered the Respondent to reinstate Williams and Johnson to their former positions as regular run drivers and, on request, to bargain with the Union. Thereafter, the Board filed a petition for enforcement of its Order with the United States Court of Appeals for the Fourth Circuit.

On September 4, 1997, the court enforced the Board's findings that the Respondent had violated the Act by failing to reinstate Williams and Johnson to their former positions as regular run drivers at the conclusion of the economic strike.[2] However, the court remanded to the Board the issue of whether, in light of the Respondent's subsequent discharges of Williams and Johnson from utility driver positions, the Respondent was still obligated to reinstate Williams and Johnson to their former positions as regular run drivers. The court also remanded to the Board the issue of whether the Respondent possessed a good-faith doubt of the Union's majority status when it withdrew recognition from the Union.

On June 10, 1999, the Board remanded the case to Administrative Law Judge John L. West to resolve the issues raised by the court on remand. The Board directed the judge to prepare a supplemental decision, which contained findings, conclusions, and recommendations, based on all the record evidence.

On August 20, 1999, the judge issued the attached supplemental decision in which he affirmed his earlier findings that the Respondent had violated Section 8(a)(3) and (1) by unlawfully failing and refusing to reinstate Williams and Johnson to their former positions and by subsequently unlawfully discharging them, and that the Respondent had violated Section 8(a)(5) and (1) by unlawfully withdrawing recognition from the Union. Thereafter, the Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions, and to adopt his recommended Order On Remand, but only for the reasons set out below.[4]

## I. FACTUAL OVERVIEW

Before considering in turn the issues raised by the court on remand, we will set out a brief overview of the facts.

In the summer of 1990, the Union began organizing the Respondent's drivers. Johnson, who had originally contacted the Union, talked to other drivers about the Union and solicited authorization cards. Johnson served as the Union's observer at the October 5, 1990 election. The Union won the election and was certified as the collective-bargaining representative of the unit employees. Between November 1990 and August 1991, the parties held approximately 12 bargaining sessions, but did not reach agreement on a contract. Johnson and Williams served on the Union's negotiating committee.

On Thursday, August 8, 1991,[5] 15 of the 34 bargaining unit employees, including Williams and Johnson, struck over an issue of wages. On August 9, the Union informed Neal Wenger, the Respondent's vice president of operations, that the strikers would return to work on Monday, August 12. Wenger met individually with certain utility drivers on August 10 and offered them the regular runs previously driven by Williams and Johnson. The utility drivers accepted those positions. By letter of August 12, the Respondent informed the unit employees that some of the strikers' jobs had been permanently filled by other employees. When Williams and Johnson returned to work on August 12, their only option was to

[1] 319 NLRB 579 (1995).

[2] *NLRB v. D & D Enterprises,* 125 F.3d 200 (4th Cir. 1997).

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] In adopting the judge's recommended Order On Remand, we disavow any statements made by the judge in the supplemental decision which may be interpreted as criticizing the court's opinion.

[5] All dates hereafter refer to 1991 unless otherwise stated.

become utility drivers. Williams and Johnson accepted those positions and worked as utility drivers until the Respondent discharged them for abandonment of work on September 9 and 16, respectively.

After the strike, the parties held only one bargaining session, that of August 26. On March 27, 1992, the Union advised the Respondent that it wanted to resume bargaining and requested certain information.

By letter of April 1, 1992, the Respondent informed the Union that it was withdrawing recognition from the Union because it had a "good faith doubt" based on "objective evidence" that the Union no longer represented a majority of the Respondent's employees. By letter of April 15, 1992, to the Board, the Respondent's outside representative specified nine factors on which the Respondent relied in withdrawing recognition. In a May 20, 1992 letter to the Board, the Respondent's outside representative specified a 10th factor: a petition allegedly signed by 17 of the bargaining unit employees between November 25 and 27, 1991. Although 17 unit employees signed the petition, Wenger crossed off the names of drivers Joseph Bell, James Freeman, and Ken Hall from the petition because he did not believe that they would be counted.[6] Thus, on April 1, 1992, the Respondent relied on the November 1991 petition signed by 14 unit employees as objective evidence in support of its good-faith doubt of the Union's loss of majority status. On that same date, April 1, 1992, there were 28 employees in the bargaining unit.[7]

## II. FIRST ISSUE ON REMAND: WHETHER WILLIAMS AND JOHNSON ARE ENTITLED TO REINSTATEMENT AS REGULAR DRIVERS

The first issue remanded by the court was whether Williams and Johnson are entitled to reinstatement as regular drivers. Below, we review the relevant facts, describe the original decisions of the judge and the Board, describe the court's decision, and then turn to the judge's decision on remand. As we explain, we agree with the judge that the discharges of Williams and Johnson were unlawful and that they are entitled to reinstatement.

### *A. Factual Background*

As explained above, on August 8, 1991, 15 of the 34 bargaining unit employees, including regular drivers Williams and Johnson, staged a strike. When Williams and Johnson returned to work on August 12, they learned that they had been replaced and that their only option was to take jobs as utility drivers. Utility drivers, unlike regular drivers, did not have regularly assigned runs, but received runs only when regular drivers were absent or on vacation. As explained in the Board's original decision, when regular drivers were going to be absent, they had to notify the Respondent by 6:30 a.m. Thereafter, the Respondent would assign the vacant regular runs to the utility drivers on a first-come, first-served basis. Although regular run drivers had to call in by 6:30 a.m. if they were going to be absent, they did not necessarily have to report to work at that time. Rather, their reporting time depended on the times that their regular runs were scheduled to commence. Johnson, for example, whose regular run started at 7:55 a.m., reported for work between 7 and 7:15 a.m. Utility drivers, however, had to report for work by 6:30 a.m. so that they could compete for any regular run vacancies that might open up on a given day.

After the strike, Williams and Johnson worked only irregularly as utility drivers. According to the Respondent, Williams and Johnson had not received assignments on a regular basis because they showed up late for work, i.e., after the 6:30 a.m. reporting time for utility drivers. Williams, however, testified that in the weeks following the strike, he was especially careful to come to work on time. As explained below, neither the judge nor the Board resolved this factual dispute. In any event, in order to supplement their incomes, in early September, Williams and Johnson began driving for another company, Otis Eastern Service. To explain their absences, Williams told Wenger that he was temporarily unable to drive because of an arthritic condition, while Johnson asked for a leave of absence. After the Respondent learned that Williams and Johnson were working elsewhere, it discharged them for abandonment of work.

### *B. The Judge's Original Decision*

In his underlying decision, the judge found that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate Williams and Johnson to their former jobs as regular drivers after the strike because the Respondent had not replaced Williams and Johnson prior to the Union's unconditional offer to return the strikers to work.

[6] Hall had been discharged in March 1992 and Bell and Freeman had been laid off in August 1991.

[7] As explained by the judge in his original decision, the Respondent had contended that Bell and Freeman should be included in the unit as of April 1, 1992, and therefore included them among the 28 bargaining unit employees as of that date. Under the Respondent's view, then, 16 of the 28 unit employees, a majority, would have signed the November petition. The judge found, however, that Bell and Freeman should not have been included in the bargaining unit as of April 1, but that Williams and Johnson should have been included. On this basis, the judge found that there were 28 employees in the bargaining unit as of April 1, 1992, and that of those 28 unit employees, only 14, not a majority, had signed the petition. See *Beltway Transportation Co.,* 319 NLRB at 593 and fn. 43.

In reaching this conclusion, the judge rejected the Respondent's contention that its reinstatement of Williams and Johnson to utility driver positions was not unlawful because the utility driver position was substantially equivalent to the regular driver position. The judge found that the positions were not substantially equivalent because the regular drivers had guaranteed runs while the utility drivers did not.

The judge also found that the Respondent violated Section 8(a)(3) and (1) by unlawfully discharging Williams and Johnson from their utility driver positions. In finding this violation, the judge considered and rejected the Respondent's contention that, in effect, it had terminated Williams and Johnson for cause because of their poststrike violations of the Respondent's attendance policy. The judge observed that Williams and Johnson had engaged in "deceptions" which they had repeated at the hearing: Williams testifying that he was ill in early September when he was actually working for Otis Eastern Service, and Johnson testifying that he had taken a leave of absence at the same time when, in fact, he had called the Respondent to see if there was any work. But the judge found that this conduct was a "direct result" of the Respondent's unlawful refusal to reinstate Williams and Johnson to the positions they had held prior to the strike, and that the "Respondent [had] unlawfully created a situation and then took advantage of the situation it created and terminated Williams and Johnson." *Beltway Transportation Co.,* 319 NLRB at 593. Finally, rejecting the Respondent's contention that it was Williams' and Johnson's own fault that they could not make a living wage, the judge concluded that the Respondent's terminations of Williams and Johnson were unlawful because they were "a continuation of the unlawful discrimination engaged in by unlawfully refusing to reinstate Williams and Johnson to their prestrike positions." Id. Accordingly, the judge ordered that the Respondent reinstate Williams and Johnson to their prestrike positions as regular run drivers.

### *C. The Board's Original Decision*

In adopting the judge's decision, the Board approved his finding that the utility driver position was not substantially equivalent to the regular driver position. Specifically, the Board stated that

> As the judge explained, the decisive difference between [Williams' and Johnson's] former positions as regular route drivers and their new positions as utility drivers was guaranteed employment. As regular route drivers, Williams [and] Johnson . . . were assured both steady employment and steady income. As utility drivers, however, they were guaranteed neither employment nor wages. In this regard, we observe that it is precisely this difference, lack of guaranteed work and wages, that forced Williams and Johnson to seek other work to supplement their incomes and ultimately provided the Respondent with the opportunity to terminate them for allegedly abandoning their jobs. For all these reasons, we agree with the judge that the Respondent failed to reinstate the [two] discriminatees to positions substantially equivalent to those they held prior to the strike. [Id. at 580.]

The Board also agreed with the judge that the Respondent unlawfully discharged Williams and Johnson in early September because "but for the Respondent's unlawful failure to reinstate them to their former positions," the Respondent would not have had an opportunity to terminate Williams and Johnson for allegedly abandoning their jobs. Id. at 580.

Finally, the Board agreed with the judge that Williams' and Johnson's conduct in hiding from the Respondent the reasons for their failure to report daily at the scheduled reporting time for utility drivers, i.e., 6:30 a.m., "[did] not rise to the level of misconduct that must be shown before the Board will take the extreme step of denying reinstatement and backpay to discriminatees otherwise entitled to a remedy."[8] This was particularly true, the Board emphasized where, as here, the employee's misconduct was in part "a response to the employer's discrimination—here, the unlawful denial of reinstatement to jobs that would have provided full-time employment."[9]

Having found that Williams and Johnson were entitled to reinstatement to their regular run positions on this basis, the Board did not find it necessary to resolve the factual issue of why Williams and Johnson could not make a living wage as utility drivers. However, as explained below, it is precisely this issue that the court instructed the Board to resolve on remand. We turn now to the court's decision.

### *D. The Court's Decision*

As an initial matter, because it found that their prestrike jobs were available poststrike, the court rejected the Respondent's contention that it had not violated Section 8(a)(3) by failing to reinstate Williams and Johnson to their prestrike positions as regular run drivers because it had reinstated them to the "substantially equivalent" position of utility driver when the strike ended. *NLRB v.*

[8] 319 NLRB at 581, citing *Geo. A. Hormel & Co.,* 301 NLRB 47 (1991), enf. denied on other grounds 962 F.2d 1061 (D.C. Cir. 1992).

[9] Id. A Board majority further found that Williams' and Johnson's false testimony concerning their postreinstatement work activities was not an abuse of the Board's processes, which would justify a denial of reinstatement and backpay.

*D & D Enterprises*, 125 F.3d at 205–206. On this basis, the court found that Williams and Johnson were entitled to backpay from August 12, 1991, the date of the Respondent's unlawful failure to reinstate them to their pre-strike regular run positions, until the dates of their respective terminations as utility drivers in September 1991. Id. at 206. The court went on to state that Williams and Johnson might be entitled to backpay beyond their termination dates and to reinstatement "if Beltway's unjust failure to properly reinstate them caused them to engage in the misconduct—abandonment of work—for which they were terminated." Id.

The court then addressed the issue presented here: whether Williams and Johnson were entitled to reinstatement to their regular run driver positions "even though [they] had allegedly been terminated for a legitimate cause—abandonment of work." Id. In the court's view, the Board had premised its decision that Williams and Johnson were entitled to reinstatement on two alternate grounds:

> First, the Board concluded that Williams and Johnson were entitled to reinstatement regardless of any misconduct on their parts because Beltway never properly reinstated them to their pre-strike positions. Second, in the alternative, the Board concluded that Williams and Johnson's terminations were caused by their placement in utility driver positions following the strike. In this regard, the Board reasoned that because there was no guarantee of earning a "livable wage" as a utility driver for Beltway, Williams and Johnson's abandonment of their jobs to drive for Otis Eastern was essentially caused by their placement in utility driver positions following the strike. Id.

As to the first reason set out above, the court concluded that the Board's contention was contrary to the Board's *Wright Line* decision, where the Board set out the burden-shifting analysis it would apply to determine whether an employee was unlawfully terminated.[10] The court also found that the Board's contention was contrary to the circuit's own precedent "which requires that the Board engage in a burden-shifting analysis . . . to determine whether the employer's unfair labor practices were causally related to the employee's termination or whether the employee would have been terminated even absent the union activity."[11] Id. at 207. Thus, the court stated that under *Wright Line*, supra, and *Standard Products*, supra,

> General Counsel was required to demonstrate that Williams and Johnson's termination was somehow causally related to Beltway's unjust failure to properly reinstate them to their pre-strike positions before the Board could order reinstatement. Accordingly, if Beltway's dismissal of Williams and Johnson was for tardiness and abandonment of work and Williams and Johnson's tardiness and abandonment of work were not causally related to Beltway's unfair labor practices, pursuant to the Board's own *Wright Line* standard and our circuit precedent, the Union never established its *prima facie* case, and Beltway is not required to reinstate Williams and Johnson. Id.

The court framed the issue as "whether there was a causal connection between the Respondent's unfair labor practices and Williams and Johnson's abandonment of work." Id. In addressing this issue, the court found it significant

> [F]irst, that arriving at work by 6:30 a.m. is a requirement for all Beltway drivers—both regular run drivers and utility drivers.[12] The only difference between the two positions is that regular run drivers are guaranteed runs if they arrive at work on time, while utility drivers receive runs on a first come, first served basis . . . [and] second, that Beltway's evidence shows that Williams and Johnson received runs *every day* they arrived at work on time following the strike. According to Beltway, all Williams and Johnson had to do in order to earn a livable wage as a utility driver was to comply with a requirement of all drivers by arriving at work on time. [Id. at 208; emphasis in original.]

[10] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). As explained in *Regal Recycling, Inc.,* 329 NLRB 355, 356 (1999) (footnotes omitted):

> Under the test set out in *Wright Line*, in order to establish that the Respondent unlawfully discharged the . . . employees based on their union activity, the General Counsel must show by a preponderance of the evidence that the protected activity was a motivating factor in the Respondent's decision to discharge. Thus, the General Counsel must show that the employees engaged in union activity, that the Respondent had knowledge of that activity, and that the Respondent demonstrated antiunion animus. Once the General Counsel has made the required showing, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the protected union activity.

[11] The court cited *Standard Products Co. v. NLRB*, 824 F.2d 291 (4th Cir. 1987):

> [As] representative of a long line of Fourth Circuit precedent which requires that the Board engage in a burden-shifting analysis similar to that utilized in the Title VII context to determine whether the employer's unfair labor practices were causally related to the employee's termination or whether the employee would have been terminated even absent the union activity. [Id. at 207.]

[12] Earlier in its opinion, the court had stated that "[n]otably, both regular run and utility drivers had to report to work by 6:30 a.m." Id. at 202 fn. 1.

Thus, the court found that if the Respondent's evidence were credited, Williams' and Johnson's failure to earn a "livable wage" arose from their failure to report to work on time as utility drivers. In these circumstances, their abandonment of work would not be causally related to the Respondent's failure to reinstate them to their regular run driver positions after the strike. The court therefore reasoned that since "arriving at work on time [was] a requirement for *all* Beltway drivers" (emphasis added) the Respondent's failure to reinstate Williams and Johnson to their regular run driver positions could only have caused them to abandon their jobs as utility run drivers "if Williams and Johnson arrived at work on time and were still unable to earn a livable wage." Id. Finding that "resolution of the causation issue turn[ed] on resolution of this factual dispute,"[13] the court remanded the issue to the Board.

As explained above, the Board remanded the case to the judge to resolve these issues. In response to the Board's remand, the judge issued his supplemental decision, which we next consider.

*E. The Judge's Supplemental Decision*

First, we find that the judge erred in his analysis of whether there was a "causal nexus" between the Respondent's unfair labor practice and its subsequent discharges of Williams and Johnson to the extent that he focused on whether Williams and Johnson are entitled to reinstatement because the utility driver position was not substantially equivalent to the regular driver position. This error arose from the judge's finding that since the court had rejected the Respondent's contention that it had reinstated Williams and Johnson to substantially equivalent positions after the strike, "the court herein agrees with the Board that Williams and Johnson were not given substantially equivalent positions upon their return from the strike."[14]

In fact, the court never addressed this issue. Accordingly, in addressing the issue presented on remand, we do not rely on the judge's substantial equivalence analysis, nor on his finding that the utility driver position was not substantially equivalent to the regular driver position.[15]

The judge went on, however, to address an issue that does concern us here—the court's erroneous factual finding that all drivers, both regular and utility, had to report to work at the same time, i.e., 6:30 a.m. Although never stated in the Board's decision, the court assumed as fact that both regular run drivers and utility drivers had to report to work at 6:30 a.m.[16]

After the Board accepted the court's remand, but before it remanded the case to the judge, the Board gave the parties an opportunity to state their positions on remand. In its position statement on remand, the Respondent itself placed in issue whether the court's factual finding—that both regular run drivers and utility drivers had to report to work at the same time—was correct. Thus, the Respondent stated that "[c]ontrary to the Fourth Circuit's mistaken view (125 F.3d at 202 fn. 2 [sic], 208), regular drivers, in contrast to utility drivers, are not generally required to report to work at 6:30 a.m." Respondent's statement on remand at page 15 footnote 13. The Respondent further explained that the reporting time of a regular driver depended on the time of his individual run. Thus, while "[o]n average regular drivers arrived at work 'between 6:45 and 7:00 a.m.,'" the Respondent noted that Johnson testified that his own route started at 7:55 a.m.[17] Id.

The Board has the primary responsibility to develop the factual record in each case,[18] and the Respondent itself raised this factual issue after the Board had accepted the court's remand. Accordingly, the Board instructed the judge on remand "to address whether regular drivers and utility drivers had to arrive at work at the same time and, if not, what effect this had, if any, on their failure to make a livable wage and abandonment of work."[19] Relying on the Respondent's own admission and on Johnson's uncontroverted testimony, the judge found that regular run drivers and utility drivers were not

[13] Id. at 208, where the court defined the "factual dispute" at issue here as "whether Williams and Johnson arrived at work on time yet were unable to earn a livable wage or, alternatively, whether their failure to earn a livable wage was the direct result of their failure to arrive at work on time."

[14] Supplemental judge's decision, infra.

[15] We do not disagree with this finding, which is consistent with the Board's own finding in its original decision. We reaffirm that finding here. Accordingly, the Respondent cannot fulfill its reinstatement obligation by reinstating Williams and Johnson to the utility driver positions from which it unlawfully discharged them.

[16] As the Board explained in its decision, "[r]egular drivers must call the Respondent's office between 6 and 6:30 a.m. when they are going to be absent on a given day. The Respondent then assigns the vacant routes to the utility drivers on a first-come, first-served basis." *Beltway Transportation Co*., 319 NLRB at 579. Perhaps the court inferred from the fact that regular drivers had to call in between 6 and 6:30 a.m. if they were *not* going to report to work that regular drivers had to report to work by 6:30 a.m. As explained below, this is not the case.

[17] In this regard, Johnson testified without contradition that on August 12, 1991, which, as explained above, was the first workday after the strike ended, he arrived at the Respondent's facility "around 7:00, between 7:00 and 7:15 . . . [b]ecause that's my regular reporting time. My route started at 7:55." (Tr. 267.)

[18] Sec. 10(e) of the Act states, inter alia, that "[t]he findings of the Board with repect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

[19] Order Remanding Proceeding at fn. 4 (unpublished).

required to report to work at the same time, i.e., at 6:30 a.m.

Since we find that the judge's resolution of this factual issue is supported by substantial evidence in the record, as well as the Respondent's own admission, we adopt the judge's factual finding that regular run drivers and utility drivers did not have to arrive at work at the same time. In his discussion of the possible effect of this factual mistake, the judge wrote that

> Perhaps . . . the court is taking the position that if both utility drivers and regular run drivers have to report at the same time and if Williams and Johnson were unable or unwilling to report for work at 6:30 a.m., it would logically follow that Williams and Johnson were unable or unwilling to report at the designated starting time for regular run drivers and, therefore, they abandoned their right to be reinstated to their former jobs or a substantially equivalent position.[20]

The judge found that this position turned on an erroneous understanding of the facts: as explained above, regular run drivers did *not* necessarily have to report for work at 6:30 a.m. Rather, their reporting time depended on the starting time of their regular runs.

*F. Analysis*

For the reasons set out below, we find that there were substantial differences between the regular run and utility run positions and that these differences bear on the existence of a "causal nexus" between the Respondent's failure to reinstate Williams and Johnson to the regular run positions and its subsequent discharge of them from their utility run positions. We also find, addressing the specific factual issue remanded by the court, that Williams did arrive at work on time as a utility driver, but was still unable to make a livable wage.

1. Substantial differences between utility run and regular run positions

As explained below, there were two substantial differences between utility run and regular positions: (1) reporting time and (2) guaranteed employment. We discuss each difference in turn.

While utility drivers did have to report for work by 6:30 a.m., regular drivers reported to work shortly before their assigned runs were scheduled to commence—and their runs commenced at different times. The record establishes that Williams' regular run started at 7:45 a.m. and that Johnson's regular run started at 7:55 a.m.[21] Accordingly, if Williams and Johnson arrived at work on time when they had regular runs (7:45 or 7:55 a.m.), and if they then failed to arrive at work on time (6:30 a.m., substantially earlier) when they had utility runs, then it logically cannot be said that there was no "causal nexus" between the Respondent's failure to reinstate Williams and Johnson to their prestrike regular runs and the Respondent's subsequent discharge of Williams and Johnson for abandonment of work. Thus, but for the Respondent's unfair labor practice, Williams and Johnson would have continued to make a livable wage after the strike as regular run drivers.

Second, the Board originally found that "the decisive difference between [Williams' and Johnson's] former positions as regular route drivers and their new positions as utility drivers was guaranteed employment." The Board observed that "lack of guaranteed work and wages . . . forced Williams and Johnson to seek other work to supplement their incomes" when they were utility drivers. Yet, in the court's view, assuming the Respondent's evidence were credited, Williams and Johnson effectively would have had guaranteed work as utility drivers if they arrived at work on time after the strike, since according to Wenger, utility drivers received runs "about 95 percent of the time." (Tr. 451.)

The Respondent's own evidence, however, contradicts Wenger's assertion. Respondent's Exhibit 18 identifies the status of the Respondent's drivers after the strike. According to this document, there were six utility drivers, including Williams and Johnson, after the strike. Respondent's Exhibit 19 lists, as relevant here, the open regular runs which were assigned to utility drivers between August 12, the first workday after the strike, and September 13. There were two utility runs available on 4 of the 23 workdays in this period, three utility runs available on 12 of these days, four utility runs on 6 of these days, and five utility runs available on 1 of these days. Thus, the Respondent's own evidence establishes that on no day were there utility runs available for all six utility drivers. The Respondent's evidence further establishes that on 16 of the 23 days at issue, utility runs were available for only 33 to 50 percent of the utility drivers, and that on 6 of the remaining 7 days utility runs were available for only 66 percent of the utility drivers. Clearly, then, runs were not available for the six utility drivers "95 percent of the time." Indeed, on most of these days, only two or three of the six utility drivers would have

[20] Supplemental judge's decision, infra.

[21] Williams and Wenger both testified that Williams drove the "Passport" regular run prior to the strike (Tr. 61 and 455). R. Exh. 43(a), a November 5, 1991 bid sheet for that run, states that its hours are "7:45AM–5:45PM." As to Johnson, as explained above at fn. 17, Johnson testified without contradiction that he reported to work on August 12, the first workday after the strike ended, between 7 and 7:15 a.m. because that was his regular reporting time for his assigned route, which started at 7:55 a.m.

received runs. The Respondent's own evidence, then, disproves the Respondent's assertion that if Williams and Johnson had arrived for work on time as utility drivers, they would have, in effect, been guaranteed runs.[22]

That guaranteed work was the decisive difference between regular drivers and utility drivers is further supported (as the court points out in its decision[23]) by the Respondent's evidence, which indicates that Williams and Johnson were reprimanded several times for arriving late for work prior to the strike when they were regular run drivers. In our view, such a finding only confirms the "causal nexus" between the Respondent's failure to reinstate Williams and Johnson to their regular run positions after the strike and its subsequent discharge of them. There is nothing in the record to indicate that such prestrike tardiness resulted in the loss of their regular runs on the days that they were late. By contrast, if Williams and Johnson arrived later than 6:30 a.m., even if by a few minutes, when they were utility drivers, they would not have received a run on that day. Thus, tardiness had a very different effect on Williams' and Johnson's ability to make a livable wage, depending on whether they were regular drivers or utility drivers.

2. The factual issue on remand

Having determined that substantial differences existed between the utility driver and regular driver positions, we now address the specific factual issue set by the court on remand: whether Williams and Johnson arrived at work on time as utility drivers but were still unable to make a livable wage.

In his supplemental decision, the judge credited Williams' "specific testimony that he arrived at Beltway on or before 6:30 a.m. after he returned from the strike up to the time he ceased coming in because he did not receive sufficient work[.]"[24] We find no basis for overturning this factual finding, which turns on credibility, and therefore affirm the judge's finding that Williams arrived at work each day after the strike prior to 6:30 a.m. Further, we find that the fact Williams arrived at work on time each day after the strike but was not able to make a livable wage is consistent with the Respondent's own evidence, as set out in Respondent's Exhibit 19 discussed above, that there were usually only two or three utility runs available for the six utility drivers. Finally, we observe that even if the Respondent's evidence, as set out in Respondent's Exhibit 21, were credited, and after the strike Williams arrived for work on 2 days at 6:45 a.m., and on 1 day at 7 a.m., he would not have been late for work on those days if the Respondent had reinstated him to his regular run after the strike as the court has found it was obligated to do.

Johnson did not testify that he arrived for work on time every day after the strike, and he conceded that he did arrive later than 6:30 a.m.[25] We therefore conclude that Johnson did arrive late for work on certain days after the strike. If the Respondent's evidence, as set out in Respondent's Exhibit 29, were credited, Johnson arrived at work later than 6:30 a.m. on 6 days between August 12 and September 6. This same evidence, however, indicates that Johnson reported for work no later than 7:15 a.m. on any of these 6 days. Thus, if the Respondent had reinstated Johnson to his regular run position after the strike, as it was lawfully required to do, Johnson would have been on time for work on each of these 6 days and would not have lost his run for the day.

In sum, we find that there is a "causal nexus" between the Respondent's unfair labor practice in failing to reinstate Williams to his regular run after the strike and its subsequent discharge of Williams from his utility driver position for abandonment of work, since Williams reported to work on time each day after the strike but was still unable to make a livable wage. We further find that, even assuming that Williams and Johnson did arrive late to work after the strike on certain days, there is still a "causal nexus" between the Respondent's failure to reinstate them to their regular run positions after the strike and their subsequent discharges for abandonment of work. The Respondent's own records indicate that on the days that Williams and Johnson arrived late for work as utility drivers, they would have arrived on time for work as regular drivers and would therefore not have lost their runs—and their wages—for the day. Thus, but for the Respondent's unlawful failure to reinstate them to their regular driver positions, Williams and Johnson would have continued to make a livable wage as regular drivers after the strike, they would not have been forced

[22] Thus, even a driver who reported for work every day by 6:30 a.m. would receive utility runs on average only approximately 50 percent of the time, and therefore would still be unable to earn a livable wage. Moreover, to assume otherwise, that if Williams and Johnson had arrived at work on time as utility drivers they would have received runs, would be to assume that if they arrived at work on time, more utility runs would be available than there would have been if they had not arrived at work on time, and that therefore all the utility drivers who reported for work on time would receive runs. The truth is precisely the opposite. If Williams and Johnson arrived at work on time, there would have been the same number of utility runs available, but more drivers to compete for those runs. Thus, arriving at work on time was not a guarantee that any of the utility drivers, including Williams and Johnson, would receive a run. Wenger admitted as much when he testified that utility drivers received runs on a "first in, first out" basis. (Tr. 450.)

[23] 125 F.3d at 208 fn. 5.

[24] Supplemental decision, above at fn. 11.

[25] Infra.

to look for alternative work, and the Respondent would not have discharged them for abandonment of work.

For all these reasons, we adopt the judge's reaffirmance of his original finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Williams and Johnson. We shall therefore require the Respondent to reinstate Williams and Johnson to their regular run driver positions and to make them whole by giving them backpay from the date of its unlawful failure to reinstate them to their regular driver positions until the Respondent reinstates them to their regular run positions or to substantially equivalent positions.[26]

## III. SECOND ISSUE ON REMAND: WHETHER THE RESPONDENT'S WITHDRAWAL OF RECOGNITION WAS UNLAWFUL

The second issue that the court remanded to the Board was whether the Respondent possessed a good-faith doubt of the Union's majority status when it withdrew recognition from the Union.

### *A. Factual and Procedural Background*

The facts are briefly stated. As explained above, the Respondent withdrew recognition from the Union on April 1, 1992, because it asserted that it had a good-faith doubt based on "objective evidence" that a majority of unit employees no longer supported the Union. The "objective evidence" was a petition assertedly signed by 17 unit employees between November 25–27, 1991, which stated that the employees no longer wanted to be represented by the Union. After the petition was presented to the Respondent, Wenger crossed off the names of 3 of these 17 employees (Hall, Freeman, and Bell), because he thought that they would not be counted. On April 1, 1992, there were 28 employees in the bargaining unit.[27]

In his original decision, the judge found that the Respondent could not rely on the November 1991 petition in support of its professed good-faith doubt of the Union's majority status because he found that the Respondent had unlawfully refused to reinstate Williams and Johnson, the most active union supporters and strike leaders, and had subsequently discharged them. *Beltway Transportation Co.,* 319 NLRB at 594. The judge further found that unit employees would have known that Williams and Johnson were active union supporters and that the Respondent had replaced them after the strike.[28] Id. Finding that the Respondent's unfair labor practices were "designed to undermine its employees' support for the Union and [were] aimed at causing them to circulate a decertification petition," the judge concluded that the Respondent "could not rely on the results of its unlawful conduct to justify its withdrawal of recognition from the Union and its later refusal to bargain."[29] Id.

The Board rejected the Respondent's exception to the effect that even if one assumed that the Respondent had unlawfully failed to reinstate Williams and Johnson after the strike and had subsequently unlawfully discharged them, that conduct would not have tainted the petition because most employees were unaware of this unlawful conduct when they signed the petition. Id. at 582. The Board observed that "an employer's misconduct in engaging 'in unlawful activity aimed specifically at causing employee disaffection with their union . . . will bar any reliance on an expression of disaffection by its employees, notwithstanding that some employees may profess ignorance of their employer's misconduct.'" Id., quoting *Hearst Corp.,* 281 NLRB 764, 765 (1986), affd. mem. 837 F.2d 1088 (5th Cir. 1988).

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[26] See fn. 15, above.

[27] As explained above at fn. 7, in April 1992, Wenger included Bell and Freeman in the bargaining unit and therefore the Respondent asserted that 16 of the 28 bargaining unit employees had signed the petition and that therefore a majority of the 28 unit employees no longer wanted the Union to represent them. The judge found, however, that Bell and Freeman should not be included in the unit, but that Williams and Johnson should be. Thus, on April 1, 1992, there were 28 employees in the bargaining unit—including Williams and Johnson, but excluding Bell and Freeman. Of those 28 unit employees, 14 had signed the November petition.

[28] As explained by the judge, six of the employees who signed the petition testified that Williams and Johnson were the most active union supporters and/or strike leaders; three of these employees, as well as two other petition signers, also testified that they knew or were aware, at the time they signed the petition, that the Respondent had failed to reinstate Williams and Johnson after the strike and/or had subsequently discharged them; and nine employees (including Freeman) testified that they were unaware of the Respondent's unfair labor practices when they signed the petition. 319 NLRB at 590–591 fn. 36. As the judge further explained, Wenger testified that it was common knowledge that Williams and Johnson were leaders for the Union, and, based on the Respondent's August 12 letter to its employees informing them that some strikers' jobs had been filled by other employees, he suspected that by August 12 it was also common knowledge that Williams and Johnson had been replaced. Id. at 591. See also the judge's supplemental decision, above at fn. 13.

[29] See *Beltway Transportation Corp.,* 319 NLRB at 594, where the judge, quoting *Fabric Warehouse*, 294 NLRB 189, 192 (1980), affd. mem. sub nom. *Hancock Fabrics v. NLRB*, 902 F.2d 28 (4th Cir. 1990), explained:

> It is well established that, where an employer has engaged in unlawful conduct tending to undercut its employees' support for their bargaining representative, the employer cannot rely on any resulting expression of disaffection by its employees because its asserted doubt of the union's majority status has been raised in the context of its own unfair labor practices directed at causing such employee disaffection. *Hearst Corp.,* 281 NLRB 764 (1986), affd. mem. 837 F.2d 1088 (5th Cir. 1988). Further, such misconduct will bar any reliance on a tainted decertification petition even though a majority of the petition signers profess ignorance of their employer's misconduct. [Id at 765.]

While observing that a petition signed by at least half of the unit employees which states that they do not wish to be represented by the union "ordinarily constitutes sufficient objective evidence to rebut the union's presumed majority status," the court explained that the employer's good-faith defense would fail if the General Counsel presented evidence which established that the employer's misconduct caused the union's decline in support. *NLRB v. D & D Enterprises*, 125 F.3d at 209. Citing, inter alia, the Board's decision in *Master Slack Corp.,* 271 NLRB 78 (1984), the court then stated that to rebut an employer's asserted good-faith doubt of the union's majority status, "a multi-factored analysis must be undertaken to determine the validity of the employer's belief."[30] Id.

Applying these analytical guidelines here, the court criticized the Board for adopting the judge's finding that the Respondent's unfair labor practices had tainted the decertification petition "notwithstanding the fact that many of Beltway's eligible employees professed ignorance of their employer's misconduct . . . and without applying the multi-factored analysis required by Board precedent." Id. The court concluded that in the absence of any evidence "suggesting a connection" between employee disaffection and the Respondent's unfair labor practices, and given the testimony "suggesting that many of the petition's signatories were unaware of Beltway's misconduct," the Board should, "at a minimum" have applied its multi-factored analysis in assessing the validity of the Respondent's good-faith doubt defense, "rather than dismissing Beltway's defense out of hand." Id. The court therefore remanded the issue to the Board "to properly assess the validity of the Respondent's defense.[31] Id.

As explained above, the Board remanded this issue to the judge for resolution. In his supplemental decision, the judge found that, in the circumstances present here, the fact that "many" of the petition signers might have been unaware of the Respondent's misconduct, "either considered alone or in conjunction with the alleged absence of any evidence suggesting a connection between the employee disaffection from the Union and Beltway's misconduct with regard to Williams and Johnson," did not warrant changing the Board's prior finding that the Respondent's unfair labor practices tainted the November 1991 petition.[32] Accordingly, the judge reaffirmed his earlier finding that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union on April 1, 1992, and by thereafter refusing to bargain with it.

*B. Analysis*

For the following reasons, we agree with the judge. The court raised two concerns in remanding the issue of the validity of the decertification petition as evidence of the Respondent's good-faith doubt of the Union's majority status. The first issue was that "many" of the petition signers professed ignorance of the Respondent's unfair labor practices relating to Williams and Johnson at the time they signed the petition. The second issue was the absence of any evidence suggesting a connection between employee disaffection from the Union and the Respondent's misconduct. We shall consider these issues in turn.

1. Knowledge of Respondent's misconduct

Although eight of the unit employees who signed the petition professed ignorance of the Respondent's misconduct at the time they signed it.[33] But, as explained above at footnote 28, five of the petition signers knew or were aware, at the time they signed the petition, that the Respondent had failed to reinstate Williams and Johnson after the strike and/or that the Respondent had subsequently discharged them. Further, six of the petition signers knew that Williams and Johnson were the most active union supporters and/or that they were strike leaders. Here, only 14 of the 28 unit employees (exactly half, but not a majority) signed the petition. That five of those were aware of the Respondent's unfair labor practices when they signed the petition is enough to establish that

[30] The court explained that:

> These factors include: (1) the length of time between the unfair labor practice and the decertification petition; (2) the nature of the employer's illegal acts; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. See *Master Slack*, [271 NLRB at 84].

[31] The court further stated that a remand of this issue was necessary because if the Board found that Williams and Johnson must be reinstated, the "numerical calculus" would change and there would be 30 employees in the bargaining unit and therefore the Union would still enjoy majority support. Id. at 209–210. Although we have found that Williams and Johnson must be reinstated, this finding does not affect the "numerical calculus" because, as explained above at fns. 7 and 27, the judge had already included Williams and Johnson in the bargaining unit when he calculated that there were 28 unit employees.

[32] See supplemental judge's decision, infra.

[33] We find it somewhat implausible, however, that in such a small group of employees, and where the difference between regular run and utility run driver positions is so substantial, that any driver would not have noticed that these two striking employees had been placed on their return in utility drivers positions instead of their regular run driver positions, and that shortly after their return they had been discharged.

As explained above at fn. 28, in finding that nine of the petition signers were unaware of the Respondent's misconduct when they signed the petition, the judge included former unit employee Freeman. Since the Respondent had crossed his name off the petition, and since the judge found that Freeman was not a unit employee when he determined that there were 28 unit employees as of April 1, 1992, we will not consider Freeman's testimony in resolving the issue.

the Respondent's misconduct could have had an effect on the unit employees' disaffection from the Union. We next address the issue of whether the Respondent's misconduct did have such an effect.

2. The effect of the Respondent's misconduct

To resolve the issue of whether the Respondent's misconduct had an effect on the unit employees' disaffection from the Union, we will apply a "*Master Slack* analysis," as required by the court. Thus, as explained at footnote 30 above, we shall examine the following factors:

> (1) the length of time between the unfair labor practice[s] and the decertification petition; (2) the nature of the employer's illegal acts; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

As to the first factor, the length of time between the unfair labor practices and the decertification petition, 9 weeks elapsed between the Respondent's unlawful terminations of Williams and Johnson in September 1991 and the decertification petition,[34] and 15 weeks elapsed between the Respondent's August 12 failure to reinstate Williams and Johnson and the petition. Given the seriousness of the Respondent's unfair labor practices, as discussed below, we find that "the mere passage of time would not reasonably dissipate the effects of the unfair labor practice[s] in the circumstances of this case." *Williams Enterprises*, 312 NLRB 937, 939 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995) (4 months between employer's misconduct and decertification petition).[35]

As to the second factor, the nature of the Respondent's illegal acts, the Respondent failed to reinstate Williams and Johnson and subsequently discharged them. As the Board explained in *Olson Bodies, Inc.*, 206 NLRB 779, 779 (1973):

> Discriminatory discharges of employees because of their union activities strike at the very heart of the Act. Their lasting impact, including the likelihood of their causing employees to defect from unions and their tendency to undermine a union's majority status by discouraging union membership and deterring organizational activity, is well settled.

Thus, the Respondent's unfair labor practices were of a most serious nature, and their impact on employees would be magnified by the fact that they were unremedied.

As to the third factor, whether the Respondent's misconduct tended to cause employee disaffection from the Union, we find that the Respondent's unremedied unfair labor practices, which, as stated above, "strike at the very heart of the Act," would reasonably tend to cause employee disaffection from the Union. See *Williams Enterprises*, 312 NLRB at 940.

Finally, as to the fourth factor, the effect of the unlawful conduct on employee morale and membership in the union, as the court observed, there is no direct evidence which establishes that the Respondent's unfair labor practices caused the employees' disaffection from the Union. However, we find that, in the circumstances present here, it is reasonable to infer as much. The Union won the election and was certified as the bargaining representative of the unit employees in fall 1990. There is no evidence of employee disaffection from the Union between that time and the Respondent's unfair labor practices in August and September 1991. After the Respondent engaged in those unfair labor practices, the decertification petition effort occurred. Absent any alternate explanation for the employees' disaffection from the Union, we find it reasonable to infer that the Respondent's misconduct contributed to that disaffection. See *Williams Enterprises*, 312 NLRB at 940.

For all these reasons, we find that a causal relationship exists between the Respondent's unfair labor practices and the decertification petition. Accordingly, we find that the petition was tainted by the Respondent's misconduct and that the Respondent could therefore not rely on the decertification petition in support of its asserted good-faith doubt of the Union's majority status. We therefore adopt the judge's reaffirmance of his original finding that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union and by refusing to bargain with it.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, reaffirms its original Order, reported at 319 NLRB 579 (1995), and orders that the Respondent, D & D Enterprises, Inc. d/b/a Beltway Transportation Company, Forrestville, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in that Order.

*James P. Lewis, Esq.* and *Elicia Lynne Marsh, Esq.,* for the General Counsel.

*Steven C. Kahn, Esq. (Miller, Canfield, Paddock & Stone, P.L.C.),* of Washington, D.C., for the Respondent.

[34] In his supplemental decision, the judge incorrectly stated that 5 weeks elapsed between these two events. This inadvertent error does not effect our analysis.

[35] In reaching this conclusion, we note that the court itself cited *Columbia Portland Cement Co. v. NLRB*, 979 F.2d 460, 462–465 (6th Cir. 1992), for the proposition that an "employer's failure to reinstate has long lasting effect on validity of [a] decertification petition." *NLRB v. D & D Enterprises*, 125 F.3d at 210 fn. 6.

*Hugh J. Beins, Esq. (Beins, Bidley, Axelrod & Kraft, P.C.),* of Washington, D.C., for the Charging Party.

SUPPLEMENTAL DECISION

JOHN H. WEST, Administrative Law Judge. The 7-day trial in this proceeding closed on November 24, 1992, and on June 9, 1993, I issued a decision in this proceeding.[1] On October 31, 1995, the National Labor Relations Board (the Board) issued a Decision and Order, reported at 319 NLRB 579, adopting my findings that (1) D & D Enterprises, Inc. d/b/a Beltway Transportation Company (Beltway) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by, inter alia, failing to reinstate economic strikers Jimmy Williams and David Johnson to their former jobs and by subsequently discharging them, and (2) in light of the involved violations of the Act, Beltway could not rely on a tainted decertification petition, and by failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of the employees in the involved unit Beltway violated Section 8(a)(1) and (5) of the Act.

Thereafter, the Board filed with the United States Court of Appeals for the Fourth Circuit a petition for enforcement of its order entered against Respondent.[2]

On September 4, 1997, the court in *NLRB v. D & D Enterprises,* 125 F.3d 200 (4th Cir. 1997), issued its decision granting the petition for enforcement in part, vacating it in part, and remanding for further proceedings. As here pertinent, the court granted that portion of the Board's petition, which determined that Beltway violated the Act when it replaced Williams and Johnson as regular run drivers after the involved strike and gave them utility driver positions.[3] The court ordered Beltway to award Williams and Johnson backpay from August 12, 1991, until the date of their respective terminations. The court vacated that portion of the Board's order, which (1) ordered the reinstatement of Williams and Johnson, and (2) ordered Beltway to recognize and bargain with the Union due to the invalidity of the decertification petition. The court remanded the matter so the Board could resolve the evidentiary dispute between Beltway, and Williams and Johnson regarding the reason Williams and Johnson did not receive runs to drive following the August 1991 strike. And the court indicated that "[t]he Board may then consider what effect, if any, its resolution of this dispute has on the reinstatement and back pay issues for Williams and Johnson, and the validity of the decertification petition."[4]

On December 12, 1997, the Board advised the parties that it had decided to accept the court's remand and the Board invited statements of position.

In mid-January 1998: (a) the General Counsel, (b) the Drivers, Chauffeurs and Helpers Local Union No. 639 a/w International Brotherhood of Teamsters, AFL–CIO (the Union) and, (c) Beltway filed statements of position.

On June 10, 1999, the Board issued an Order indicating, as here pertinent, as follows:

> IT IS ORDERED that this case is remanded to Administrative Law Judge John H. West to resolve the issues raised by the court on remand.
>
> IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a supplemental decision containing findings, and recommendations, based on all the record evidence.

In footnote 4 of the Remand Order the Board indicated "in remanding this case to the judge, we instruct him to address whether regular drivers and utility drivers had to arrive at work at the same time and, if not, what effect this had, if any, on their failure to make a livable wage and abandonment of work."[5]

In her statement of position, counsel for the General Counsel contends that the record is sufficient to resolve the evidentiary dispute regarding the reason Williams and Johnson did not receive runs; that the availability of runs for utility drivers depended on whether regular run drivers and/or charter drivers were absent and not able to perform their runs for the day; that the evidence fails to establish that the utility driver's arrival time determined whether or not work was available; that Beltway did not produce evidence legally sufficient to demonstrate that Williams and Johnson could earn a livable wage given the number of other utility drivers with whom they had to compete for work; that from August 12 to September 13, 1991, no more than three of the approximately six utility drivers could conceivably make a livable wage; that Williams' and Johnson's attempt to seek additional work was the direct result of Beltway's unlawful action of not reinstating the employees to their regular positions they held before the strike which guaranteed work and a steady livable wage; that but for Williams' and Johnson's unlawful replacement and demotion to intermittent work, questions about their unavailability and alleged misconduct would not have arisen; that the subsequent terminations of Williams and Johnson were not causally connected to their reporting time, but rather, directly related to Beltway's initial refusal to reinstate them as regular run drivers; that Beltway did not have a timeclock that recorded employees' official arrival at the plant, and therefore did not provide sufficient probative documentary evidence to (1) support its position that Williams and Johnson were unable to earn a livable wage because they

[1] There were 966 pages of transcript and briefs were filed in late January 1993.

[2] It is noted that the Board in its Order remanding the proceeding, as described below, indicates that Beltway filed a petition for review with the United States Court of Appeals for the Fourth Circuit.

[3] Before the strike Williams and Johnson had their own assigned bus routes. After the strike as utility drivers they did not have assigned bus routes but rather filled in on an as needed basis.

[4] 125 F.3d at 210. The court pointed out that a remand was necessary because the Board failed to properly assess the validity of Beltway's defense and the Board should have applied its own multifactored analysis in assessing the validity of Beltway's good-faith defense to its withdrawal of recognition of the Union. *Master Slack Corp.,* 271 NLRB 78 (1984).

[5] In fn. 7 of its Remand Order the Board denied the Respondent's motion to reopen the record to introduce evidence of employee turnover on the basis that such evidence is irrelevant to the validity of the employee decertification petition as a basis for the Respondent's withdrawal of recognition from the Union. Additionally, the Board pointed out that "employee turnover *after* the date the Respondent withdrew recognition can have no probative value in determining whether the Respondent had a lawful basis for doing so." (Emphasis in original.)

frequently arrived to work late and, therefore, did not receive runs, and (2) rebut Williams' and Johnson's testimony regarding when they arrived for work as utility drivers after the strike; that there is no evidence to suggest that the employees assigned to utility drivers positions, poststrike, could earn a livable wage even if they arrived daily at 6:30 a.m. in that there were more utility drivers on hand than there were actual absences that required a substitute driver; that Beltway's own evidence demonstrates that contract runs were assigned only to at most three or four utility drivers from August 12 to September 13, 1991, and on August 12, 14, 20, and 22, 1991, Beltway had open contract runs sufficient to assign to only two utility drivers; that even if all six utility drivers arrived at 6:30 a.m., a contract run could not possibly be guaranteed to all utility driver employees; that by denying Williams and Johnson their regular runs and the weekend work they both did Beltway denied the two employees the ability to earn a livable wage; that Beltway's own exhibits demonstrate that the pay for Williams and Johnson as utility drivers was blatantly inadequate and Williams testified that as a utility driver he was "in financial trouble . . . getting ready to get evicted [and] wasn't making enough [money] to feed [three young kids, ages 9 to 3], to clothe them or to pay rent [and went] back to the union [to] ask for help . . . to subsidize the lost days"[6] (all bracketed words in original); that while Beltway's vice president of operations, Neal Wenger, testified that half of the time he assigned work around the office to utility drivers when runs were not available, he did not assign such work to Williams and Johnson on the days when runs were not available for them; that Williams and Johnson were constructively discharged, *Pillsbury Chemical Co. v. Teamsters,* 317 NLRB 261, 265–266 (1995); *Assn. of Apartment Owners,* 255 NLRB 127 (1981); and *Fidelity Telephone Co.,* 236 NLRB 166 (1978); that but for the employees' abrupt replacement and demotion, Williams and Johnson would have earned a livable wage performing regular and guaranteed work, and would not have sought additional work to supplement a diminished income; that Williams and Johnson must be reinstated to their regular run positions or substantially equivalent positions, and with their reinstatement the 14 signatures on the decertification will be insufficient to rebut the Union's majority support; and that the petition was tainted by the coercive effect of Beltway's unfair labor practices of its refusal to reinstate Williams and Johnson and its subsequent termination of the two most visible union supporters because the conduct was aimed at undermining employee support for the Union.

In its statement of position the Union argues that in effect Williams and Johnson were starved out of their jobs and they had to find other employment in order to make a living; that the court questions whether Williams and Johnson were denied a living wage and in doing so, relies upon the testimony of the discredited Supervisor Wenger that they "received runs everyday they arrived at work on time following the strike" (slip op. at 14); that after returning from the strike Williams reported for work every day for 3 or 4 weeks and he received about 3 days' work a week, which was usually weekends; that Beltway dried Williams up and strangled him economically and there was no question that Beltway was bent on a constructive discharge; that Wenger told Williams that he might lose his job because of the Union; that after the strike Johnson reported for work each day until August 27, 1991, but worked only 4 days; that before the strike Johnson worked 60 to 70 hours a week; that by taking away Williams' and Johnson's regular runs and making them utility drivers Beltway sent a message to the other employees, namely if you support the Union you will lose your regular job; that the credibility of Wenger and the other Beltway witnesses was destroyed; that "[w]ith all due respect to the Fourth Circuit, there is no way to separate the events [in that] [t]hey are part and parcel of one concerted effort by [Beltway] to destroy the Union";[7] that Beltway cannot refuse to bargain with the Union based on a decertification petition where the context involves substantial unremedied employer unfair labor practices; that the test is not direct evidence of causation; that the correct test is whether the unfair labor practices had a "reasonable tendency" to erode the Union's support, thereby precluding the Employer from relying on any good-faith defense, *Columbia Portland Cement Co.,* 303 NLRB 880 (1991), enf. 979 F.2d 460 (6th Cir. 1992); that this case does not require any further trial and the record is complete; that Beltway's credibility was destroyed and "should not now be revived by the Fourth Circuit or any one else";[8] and that this case presents classic 8(a)(1), (3), and (5) violations, the parts cannot be separated, and Beltway's conduct is part and parcel of a continuing scheme to destroy the Union.

Beltway, in its statement of position, contends that Williams acknowledged that on only 2 days between August 12, when he returned to work following the end of the involved strike, and September 4, 1991, when he left Beltway to accept a job with Otis Eastern, did he fail to receive a run; that Johnson acknowledged that he frequently arrived late to work between August 12 and 29, 1991, when he abandoned the job altogether and that on only 1 day did he fail to receive a run which he believed (albeit incorrectly) that he, rather than the driver regularly assigned the run, should have received; that the overwhelming weight of the evidence, including Beltway's contemporaneous, unimpeached documents, establishes that the alleged inability of Williams and Johnson to secure sufficient work at Beltway after the strike was attributable solely to their repeated tardiness; that nothing in the record suggests that Beltway's reinstatement of Williams and Johnson to the job of utility driver, rather than to their regular prestrike runs, "caused them to engage in the misconduct—abandonment of work—for which they were terminated." 125 F.3d at 206; that even if the Board determines that Williams and Johnson should be reinstated, a bargaining order still is not warranted in light of (1) the absence of evidence that the termination of Williams and Johnson prompted employees to abandon the Union and (2) uncontradicted evidence that (a) the decision of employees to sign the decertification petition was not influenced by the alleged discriminatory treatment of Williams and Johnson, (b) employees generally were unaware that Williams and Johnson were not reinstated to their prestrike runs, and (c) many

[6] Counsel for the General Counsel's statement of position at 7, referring to Tr. 70 and 71.

[7] The Union's statement of position at 8.

[8] Id. at 9.

employees were not even aware that Williams and Johnson and had been terminated by Beltway; that even if the Board determines that the decertification petition was not valid, and the withdrawal of recognition unlawful, issuance of a bargaining order is not warranted in view of the passage of time since commission of the alleged unfair labor practices and the substantial employee turnover; and that if the Board determines that the withdrawal of recognition was unlawful, the only appropriate remedy is an election, rather than a bargaining order.

As indicated above, neither the counsel for the General Counsel nor the Union believes that it is necessary to reopen the record herein, and the Board has already ruled on the only reason advanced by Beltway for reopening the record.

Before getting into the stated reasons why this case was remanded, certain conclusions of the court in its decision herein must be addressed. First, in this case the court (125 F.3d fn. 1 at 202) indicates "[n]otably, both regular run and utility drivers had to report to work by 6:30 a.m." Also, the court, 125 F.3d at 208, reached the following conclusions:

> In considering the Board's argument that Beltway's misconduct caused Williams and Johnson to abandon work, we note, first that *arriving at work by 6:30 a.m. is a requirement for all Beltway drivers—both regular run drivers and utility drivers*. [Emphasis added.] The only difference between the two positions is that regular run drivers are guaranteed runs if they arrive at work on time, while utility drivers receive runs on a first come first served basis. We note, second, that Beltway's evidence shows that Williams and Johnson received runs *every day* they arrived at work on time following the strike. [Emphasis in original.] According to Beltway, all Williams and Johnson had to do in order to earn a livable wage as a utility driver was to comply with a requirement of all drivers by arriving at work on time. Thus, if Beltway's evidence is credited, their failure to earn a livable wage was attributable to their failure to arrive at work on time, not to their status as utility drivers and, consequently, not to Beltway's misconduct in reinstating them into utility driver positions. [Footnote omitted.] As noted earlier, however, Williams and Johnson assert that they did arrive at work on time and that they simply were not given sufficient runs to enable them to earn a livable wage.
>
> Because arriving at work on time is a requirement for all Beltway drivers, Beltway can only be said to have caused Williams[']' and Johnson's abandonment of work if Williams and Johnson arrived at work on time and were still unable to earn a livable wage. Both the ALJ and the Board, however, declined to resolve the parties' factual dispute concerning whether Williams and Johnson arrived at work on time yet were unable to earn a livable wage or, alternatively, whether their failure to earn a livable wage was the direct result of their failure to arrive at work on time. Because resolution of the causation issue turns on the resolution of this factual dispute, we remand this issue for further proceedings consistent with this opinion.

Perhaps the court is taking the position that all drivers (both utility and regular run) have to arrive at work at 6:30 a.m. and if Williams and Johnson were unable to accomplish this as utility drivers, then they, by their own conduct, were responsible for having their right to be reinstated to regular run positions (former job or a substantially equivalent position) extinguished. With all due respect to the court involved here, the problem is that the underpinning for the court's conclusion is factually not true. The following appears in footnote 13, page 15 of Beltway's statement of position:

> Contrary to the Fourth Circuit's mistaken view (125 F.3d at 202 n. 2, 208), [Actually the note in question is [fn. 1 at 202] regular drivers, in contrast to utility drivers, are not generally required to report to work at 6:30 a.m. (A. 381, 393). On average, regular drivers arrive at work "between 6:45 and 7:00." (A. 393). Indeed, Johnson himself testified that on August 12, 1991, when he returned from the strike, he reported to work "between 7:00 and 7:15 . . . [b]ecause that's my regular reporting time. My route started at 7:55." (A. 193) He also acknowledged that the reporting time of a regular driver varied depending on the time of the run.

Elsewhere in its decision in this case, see 125 F.3d at 206, the court concludes as follows:

> That brings us to the next question—did the Board correctly conclude that Williams and Johnson are entitled to reinstatement? The Board concluded that even though Williams and Johnson had allegedly been terminated for a legitimate cause—abandonment of work—they were still entitled to reinstatement to their pre-strike regular run driving positions. The Board premised its decision on two alternative grounds. First, the Board concluded that Williams and Johnson were entitled to reinstatement regardless of any misconduct on their parts because Beltway never properly reinstated them to their pre-strike positions. Second, in the alternative, the Board concluded that Williams[']' and Johnson's terminations were caused by their placement in utility driver positions following the strike. In this regard, the Board reasoned that because there was no guarantee of earning a 'livable wage' as a utility driver for Beltway, Williams[']' and Johnson's abandonment of their jobs to drive for Otis Eastern was essentially caused by their placement in utility driver positions following the strike.
>
> *A.*
>
> The Board first asserts that no matter what misconduct Williams and Johnson engaged in leading to their terminations, Beltway is required to reinstate them because reinstatement is the remedy prescribed by 29 U.S.C. [section] 158(a)(1), (3). Put another way, the Board contends that employee misconduct can never supersede the employer's obligation to reinstate a striking employee to his still available pre-strike position once the strike ends. We conclude that the Board's contention, which creates a *per se* rule, is contrary to the Board's own precedent and our Circuit precedent. [Emphasis in original.]

The Board, in its decision herein, never explicitly indicated that it was creating a per se rule. The following appears at 319 NLRB 579, 581 of its decision in this case:

> The actions of Williams and Johnson . . . do not rise to the level of misconduct that must be shown before the Board will take the extreme step of denying reinstatement and backpay to discriminatees otherwise entitled to a remedy. See *Geo. A. Hormel & Co.,* 301 NLRB 47 (1991) (employer seeking to be excused from reinstating and making whole a discriminatee because of misconduct that was not a factor in the employer's discriminatory action must prove that the misconduct was so flagrant as to render the employee unfit for further service or a threat to plant efficiency). Compare *Lear-Siegler Management Service,* 306 NLRB 393, 393–395 (1992) (postdischarge threat made to coemployee in order to influence his testimony in a Board proceeding sufficient to bar reinstatement). This is particularly so, as the judge noted, where the employee's misconduct is in part a response to the employer's discrimination—here, the unlawful denial of reinstatement to jobs that would have provided full-time employment. See *NLRB v. M & B Headwear Co.,* 349 F.2d 170, 174 (4th Cir. 1965) (employee misconduct provoked by employer's unlawful conduct not a bar to reinstatement), *Earle Industries,* 315 NLRB 310, 315 (1994), and cases there cited.
>
> In finding that Williams' and Johnson's false testimony concerning their postreinstatement work activities did not rise to the level of an abuse of the Board's processes that might otherwise justify a denial of reinstatement and backpay.

Can this language of the Board from its decision in this case reasonably be construed as creating a per se rule—as the court 125 F.3d at 206 of its decision herein concludes—that "employee misconduct can never supersede the employer's obligation to reinstate a striking employee to his still available prestrike position once the strike ends?" With all due respect to the court involved here, contrary to the court's conclusion on this point, I do not believe that the Board's language in its decision in this case created a per se rule. As set forth above, the Board's language in its decision in this case pointed out, in accord with Board precedent, just the opposite.[9]

The following appears at 125 F.3d at 207 and 208 of the court's decision herein:

> Our decision is not inconsistent with *David R. Webb Co., Inc. v. NLRB,* 888 F.2d 501 (7th Cir. 1989), a case heavily relied upon by the Board. In *David R. Webb*, the employer permanently filled several economic positions during an economic strike and, thus, the striking employees were validly placed on a preferential recall list. See id, at 502. When three complaining former employees reached the top of the list, they were placed into a lower level position than the pre-strike position any of the three had held. In addition, it was a position that none of the three had ever performed before, and a position for which none of them had ever been trained. See id. Not surprisingly, the three performed poorly in their new jobs, and they were discharged for that poor performance. See id. Moreover, they were not placed back on the recall list. See id. The Board concluded that all three were essentially "set up" for failure and were, therefore, entitled to be placed back on the recall list (i.e., reinstated) because their employer had never discharged its obligation to properly reinstate them following the strike. See id. at 508, 510. *The Seventh Circuit agreed and held that the company was required to reinstate the three employees to their prestrike jobs or to "substantially equivalent" positions.* See id. at 510. [Emphasis added.]

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[9] At 125 F.3d 204 of its decision herein, the court concludes as follows:

> The ALJ concluded that, although Williams and Johnson lied during the hearing regarding the reasons for their absences from work in September 1991, their abandonment of work at Beltway in September 1991 was irrelevant because *no employee misconduct could supersede the employer's obligation to reinstate a striking employee to his still available pre-strike position once the strike ended.* [Emphasis added.]

With all due respect to the court involved here, contrary to the court's assertion, I never concluded that "*no employee misconduct could supersede the employer's obligation to reinstate a striking employee to his still available pre-strike position once the strike ended.*" (Emphasis added.) My conclusions dealt only with the alleged misconduct of Williams and Johnson.

Also, in fn. 3 at p. 205 of its decision in this case the court indicates as follows: "[t]he Board agreed with the ALJ and concluded that, as a matter of law, it was irrelevant whether Williams and Johnson were *consistently tardy* during the month of August following the strike." (Emphasis added.) It is noted that the court does not take a "whether or not" approach. While the Alternative may be implied or understood, viz, "or were not consistently tardy," in the circumstances extant here—with all due respect to the court involved here—I prefer to be explicit. Nowhere in my decision do I find that Williams and Johnson were "consistently tardy." And the Board's findings on this matter, as set forth at 319 NLRB 579. 580 and 581 of its decision, consists of the following:

> According to Respondent, Williams and Johnson did not get assignments on a regular basis because they were often late for work, arriving after the available routes had been taken by other utility dirvers.[8]
>
> . . . .
>
> We also agree with the judge that the Respondent violated Section 8(a)(3) by discharging Williams and Johnson in early September. As explained above, but for the Respondent's unlawful failure to reinstate them to their former positions, the Respondent would not have had the opportunity to terminate Williams and Johnson for allegedly abandoning their jobs. In the circumstances here, we agree with the judge that the "Respondent unlawfully created a situation and then took advantage of the situation it created and terminated Williams and Johnson." Accordingly, we adopt his findings of this 8(a)(3) violation. [Footnote omitted.]

[8] The Respondent's records support this contention. Williams testified, however, that in the weeks following the strike, he was especially careful to come to work on time because he thought that the Respondent would be watching him closely. The Respondent excepts to the judge's failure to resolve this factual issue. For the reasons explained below, we find it unnecessary to decide this issue.

> The Board reads *David R. Webb* as requiring reinstatement in this case even though Williams and Johnson's tardiness and abandonment of work may have been unrelated to Beltway's unfair labor practices. At least one court agrees with the Board's interpretation of *David R. Webb*. See *NLRB v. Ryder Sys., Inc.,* 983 F.2d 705 (6th Cir. 1993) (holding that employee was entitled to reinstatement even though the employee was terminated for conduct unrelated to his union activities (gross insubordination) because employee was wrongfully reinstated without his seniority following his participation in a sympathy strike). We find the Board and the Sixth Circuit's reading of *David R. Webb* unpersuasive. First, the *David R. Webb* court was not confronted with the question presented her—whether an employee can be discharged when the cause of his termination is *unrelated* to the company's unfair labor practices. [Emphasis in original.] The court in *David R. Webb* recognized as much. See 888 F.2d at 510 ("The NLRB's order in this case, however, directs reinstatement to the employee's pre-strike positions or positions . . . substantially equivalent . . . [to] those positions, and these are positions for which the employees' inability to perform in the lower-level positions is not related"). Second, accepting the Board's view would run afoul of our decision in *Standard Products* [824 F.2d 291 (4th Cir. 1987)] which requires a showing that the termination was caused by the company's unfair labor practices. Third, our position is consistent with the balance between the rights of the employees and employers that Congress attempted to achieve in enacting the NLRA [National Labor Relations Act]. Section 158(a) provides that an employee shall not be discriminated against for engaging in union activities. On the other hand, . . . [Section] 160(c) provides that an employer cannot be required to reinstate an employe who has been properly terminated for cause. *The Board's proposed rule, which would require the reinstatement of an employee who engaged in misconduct unrelated to the employer's unfair labor practices, eviscerates the employer's rights recognized in . . . [Section] 160(c)*. Our rule, however, preserves the balance contained in the NLRA by requiring that the Board demonstrate some causal nexus between the employer's unfair labor practices and the reason for the employee's termination before the Board can order the employee's reinstatement. [Emphasis added.]

In *David R. Webb Co. v. NLRB*, 888 F.2d 501 (7th Cir. 1989), cert. denied 495 U.S. 956 (1984), the court at 503, indicated as follows:

> Webb filed exceptions to the ALJ's decision with the NLRB. After reviewing the ALJ's opinion, the NLRB issued an order adopting the ALJ's rulings, findings and conclusions. That order, however, clarified the ALJ's decision by emphasizing that because of the poor performance of the three employees in the dryer-feeder position [the lower level position mentioned above by the 4th Circuit in its decision herein], Webb was not required to retain them in that position; but because that position was not substantially equivalent to the employees' pre-strike positions, Webb failed to offer reinstatement sufficient to satisfy its obligations under *Laidlaw*.

As pointed out in *Webb*, supra at 502:

> *Laidlaw Corp. v. NLRB*, 414 F.2d 99 (7th Cir. 1969), cert denied, 397 U.S. 920, . . . (1970), [is relied on by the Board] for the proposition that employers violate Sections 8(a)(1) and (3) of the Act by failing to reinstate striking employees to their former or substantially equivalent positions . . . after the employees have unconditionally offered to return to work following an economic strike.

*Webb*, supra at 503 and 504, indicates as follows:

> Section 152(3) of Title 29 states that persons considered "employees" entitled to the protection of the Act include any individual "whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . and who has not obtained any other regular and substantially equivalent employment." [footnote omitted] Based on this provision, the Supreme Court held in *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375, 381 . . . (1967), that after a striker has made an unconditional offer to return to work, he is entitled to an offer of reinstate "[i]f and when a job for which the striker is qualified becomes available." The [C]ourt reasoned that if "after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and strike guaranteed by . . . [Sections] 7 and 13 of the Act." Id. at 378.

*Webb*, supra at 504 and 505, indicates as follows:

> The Eighth and Ninth Circuits have specifically stated that employees must be reinstated to their prior or substantially equivalent positions before an employer's obligation is satisfied. *NLRB v. Rockwood & Co.,* 834 F.2d 837, 841–42 (9th Cir. 1987) ("because the glue tank cleaning job was not substantially equivalent to [the employee's] former position, he was entitled to accept or reject it without affecting his status as an employee under section 152(3) or his right to reinstatement"); *Medallion Kitchens, Inc., v. NLRB,* 811 F.2d 456, 459 (8th Cir. 1987) ("[a]bsent a substantial and legitimate business justification, an employer's obligation is satisfied only upon an offer to the former striker of a substantially equivalent job"). Other Circuits have given similar broad interpretations to the reinstatement requirement. The Sixth Circuit has held that the positions of economic strikers may be filled by permanent replacements during the strike, but the strikers "retain the right to reinstatement in their jobs as soon as those jobs become available." *Kurz-Kasch, Inc. v. NLRB,* 865 F.2d 757, 759 (6th Cir. 1989). The Third Circuit has held that "[s]triking employees retain their status as employees and must be fully reinstated when a strike ends." *Hajoca Corp. v. NLRB,* 872 F.2d 1169, 1177 (3d Cir. 1989) (citations omitted).

*Webb*, supra at 507, indicates as follows:

> Here we are not questioning whether Webb validly discharged the three employees from the dryer -feeder position for incompetent performance. Rather, we are concerned with whether the employees were fully reinstated in the first place. When the employees accepted the lesser job of dryer-feeder, Webb removed them from the recall list and the possibility of reinstatement to their former or a substantially equivalent position. We conclude under these facts that such removal from the recall list violates the Act. The employees should maintain their "employee" status in relation to those positions, even though they were incompetent dryer-feeders.
>
> Our holding does not immunize employees from discipline who are reinstated to positions not the substantial equivalent of their pre-strike positions. The only right they maintain that is not also held by newly hired employees in the same position is the right to eventually be reinstated to their former positions or its substantial equivalent.

*Webb*, supra at 508, indicates as follows:

> Moreover, Webb's position that its recall obligation is fulfilled once a striker accepts any job for which he is qualified places economic strikers in a potentially job-fatal situation. Allowing the employer to satisfy its *Laidlaw* obligation by offering a striker a position which is not the one the striker is best able to perform (in contrast to his prestrike position) could allow a system which forces the striker to accept a position at which he is predestined to fail and thus lose his original *Laidlaw* rights in the process. This is the type of situation against which the Act was designed to protect striking employees, since returning from a strike to such a precarious situation adversely affects the employee's right to strike and organize in the first place.

*Webb*, supra at 509, indicates as follows:

> In sum, since all of Webb's arguments address its reasons for terminating the employees from the dryer-feeder position, and not reasons for terminating them from the recall list and their full reinstatement rights, we do not believe it has offered a valid defense of a legitimate and substantial business justification for its actions.

*Webb*, supra at 510 and 511, indicates as follows:

> Section 160(c) goes on to state, however, that
>
> > [n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.
>
> We read this statue as prohibiting the Board from ordering employees reinstated to the positions from which they were discharged. Webb's argument that Section 160(c) bars reinstatement here is based on its mistaken assumption that the three employees had been sufficiently reinstated at the time of their discharge from the dryer-feeder position, and that they had lost their status as "employees" under the Act. It is true that once the employees are fully reinstated to their former or substantially equivalent positions, Webb has the right to discharge them for any legal reason. See e.g., *Golden State Bottling Co. v. NLRB,* 414 U.S. 168, 189 n. 10 . . . (1973). The NLRB's order in this case, however, directs reinstatement to the employees' pre-strike positions or the substantially equivalent of those positions, and these are positions for which the employee's inability to perform in the lower-level positions is not related. It was not the discharge from the dryer-feeder position that constituted the unfair labor practice, but rather the termination of the employees' *Laidlaw* rights by removing them from the recall list and refusing to reinstate them to their former or substantially equivalent positions. Had the Board ordered reinstatement to the dryer-feeder position, . . . [Section] 160(c) would effectively prohibit such reinstatement. Because Webb did not have "cause" to terminate the three employees from the recall list and their right to eventual reinstatement to their pre-strike position or its substantial equivalent, the Board can order reinstatement as a remedy for that violation of Section 8(a)(1) and (3). *Woodlawn Hospital,* 596 F.2d [1330] at 1344 [(7th Cir. 1979)] (recognizing that where the Board properly finds a violation of the Act, it can order reinstatement under its remedial powers granted by . . . [Section] 160(c), although finding no violation of the Act here.)

Going back to the above-described conclusions of the Fourth Circuit in its decision herein regarding *Webb*, supra, as noted above the Fourth Circuit concludes as follows:

> Our decision is not inconsistent with *David R. Webb Co., Inc. v. NLRB,* 888 F.2d 501 (7th Cir. 1989), a case heavily relied upon by the Board.

With all due respect to the court involved here, as can be seen above, the Fourth Circuit's decision herein is not consistent with *Webb*, supra.

As noted in the above-quoted portion of the Fourth Circuit's decision herein, the court concludes as follows:

> *The Board concluded that all three were essentially "set up" for failure and were, therefore, entitled to be placed back on the recall list (i.e., reinstated) because their employer had never discharged its obligation to properly reinstate them following the strike.* See id. at 508, 510. The Seventh Circuit agreed. [Emphasis added.]

As can be seen above, in *Webb*, supra, both the Board and the court therein indicated that because of the poor performance of the three employees in that case in the dryer-feeder (lower level) position, the employer there was not required to retain the employees in that position. With all due respect to the court involved here, neither the Board nor the court in *Webb*, supra, concluded that the three involved employees were entitled to be placed back on the recall list because they "were essentially 'set up' for failure."

As noted in the above-quoted portion of the Fourth Circuit's decision herein, the court concludes as follows:

> First, the David R. Webb court was not confronted with the question presented here—whether an employee can be discharged when the cause of his termination is *unrelated* to the

> company's unfair labor practices. [Emphasis in original.] The court in *David R. Webb* recognized as much.

With all due respect to the court involved here, the court in *Webb*, supra, was confronted with the question presented here in that the court in *Webb* was reviewing a Board decision which decided whether the termination of employees from a job which was not the employees' prestrike job or a substantially equivalent job extinguished their right to be reinstated to their prestrike job or a substantially equivalent job.

As noted in the above-quoted portion of the Fourth Circuit's decision herein, the court concludes as follows:

> Second, accepting the Board's view would run afoul of our decision in *Standard Prods*, which requires a showing that the termination was caused by the company's unfair labor practices.

In *Webb*, supra, the employer did the same thing, namely, attempted to focus attention on the reason for terminating the employees from the job which was not the prestrike job or a substantially equivalent job, instead of addressing the reason for refusing to give the employees their full reinstatement rights in the first place and then extinguishing those rights. There the court, as noted above, determined that since all of the employer's arguments addressed the reason for termination and not the reason for extinguishing economic strikers' recall rights, the employer had not offered a valid defense of a legitimate and substantial defense for its actions. An employer, for obvious reasons, wants to shift the spotlight from (a) the fact that it refused to give full reinstatement rights in the first place and then it unjustifiably extinguished those rights to (b) the terminations. But the reason for the termination from the noncomplying job (not complying with the employer's legal obligation to give returning economic strikers their available prestrike jobs or a substantially equivalent position) is not even relevant to the matter at hand other than to determine whether it involved conduct which would extinguish a striker's right to his or her prestrike job or a substantially equivalent position. On its face, whether Williams or Johnson abandoned the noncomplying utility jobs does not rise to such level. The Fourth Circuit in its decision herein cites its decision in *Standard Products Co. v. NLRB,* 824 F.2d 291 (4th Cir. 1987) (*Standard*), and indicates that decision requires the Board

> to determine whether the employer's unfair labor practices were causally related to the employee's termination or whether the employee would have been terminated even absent the union activity.

But in 1967 in *Fleetwood Trailer Co.,* supra at 380, the Supreme Court held that the employer's refusal to reinstate striking employees is "destructive of important employee rights," and that where an employer "has not shown 'legitimate and substantial business justifications,' the conduct constitutes an unfair labor practice without reference to [employer] intent." *Standard* did not involve the rights of returning economic strikers and the extinguishing of those rights by an employer. With all due respect to the court involved here, for the above-specified reasons "accepting the Board's view [in the instant case] would [*not*] run afoul of . . . [the Fourth Circuit's] decision in *Standard Prods*." (Emphasis added.)

As noted in the above-quoted portion of the Fourth Circuit's decision herein, the court concludes as follows:

> Third, our position is consistent with the balance between the rights of the employees and employers that Congress attempted to achieve in enacting the NLRA [National Labor Relations Act]. Section 158(a) provides that an employee shall not be discriminated against for engaging in union activities. On the other hand, . . . [Section] 160(c) provides that an employer cannot be required to reinstate an employe who has been properly terminated for cause. *The Board's proposed rule, which would require the reinstatement of an employee who engaged in misconduct unrelated to the employer's unfair labor practices, eviscerates the employer's rights recognized in* . . . [Section] *160(c).* [Emphasis added.]

Beltway is not being ordered to reinstate Williams and Johnson to the utility driver positions. Beltway is being ordered to do that which it was legally obligated to do long before any question arose about whether Williams and Johnson abandoned a noncomplying job. Beltway is legally obligated to give Williams and Johnson their prestrike jobs or substantially equivalent jobs. As pointed out by the Supreme Court in *Fleetwood Trailer Co.,* supra, the only way Beltway can avoid this legal obligation is to show that there is a legitimate and substantial business justification for not giving these former economic strikers their prestrike jobs if they are, as they were here, still available. To extinguish this right would require a showing that the employees engaged in a certain level of misconduct. The misconduct alleged here does not rise to the required level. For the conclusions reached above in the quote in this paragraph to be accurate, Beltway would have had to first return Williams and Johnson to their still available prestrike jobs. Beltway did not do this. The "discharge" unfair labor practice involved here is not that Williams and Johnson were removed from the utility driver positions. The "discharge" unfair labor practice involved here is that Beltway extinguished (which is separate from the original unlawful refusal to comply with its original legal obligation to give Williams and Johnson their still available prestrike jobs) the rights of Williams and Johnson to their available prestrike jobs when the alleged misconduct, on its face, did not rise to the level that would warrant such action. If Beltway had given Williams and Johnson—on their unconditional return from the economic strike—their then available regular run jobs, then Beltway would have had the right to subsequently discharge them for any legal reason. But Beltway did not comply with this legal obligation. Again, we are not dealing with a reinstatement to the utility driver position. Consequently, with all due respect to the court involved here, Section 160(c) should not even come into play in the instant case.

Up until the Fourth Circuit's decision herein, Beltway argued that it did give Williams and Johnson, upon their return from the economic strike, a position, utility driver, which was substantially equivalent to their regular run jobs. In effect, Beltway argued that it gave Williams and Johnson a substantially equivalent position upon their return from the economic strike; that Williams and Johnson abandoned the substantially equiva-

lent positions; and that, therefore, Williams and Johnson abandoned their right to their regular runs. If the propositions that Williams and Johnson were given substantially equivalent positions and they abandoned those positions were accurate, this would be a logical argument. The problem with the argument is that Williams and Johnson were not given substantially equivalent positions on their return from the economic strike. So even assuming for the sake of argument that Williams and Johnson abandoned their nonsubstantially equivalent poststrike jobs, it could not be argued logically that in doing so Williams and Johnson abandoned their right to their regular runs. The Fourth Circuit in its decision herein specifically indicates that Beltway's argument that Williams and Johnson were reinstated to 'substantially equivalent' positions once the strike ended has no merit. In other words, the court herein agrees with the Board that Williams and Johnson were not given substantially equivalent positions on their return from the strike. Yet the court herein by its remand is requiring, in effect, that a determination be made whether Williams and Johnson abandoned the jobs which were not substantially equivalent to their prestrike jobs. Am I being asked to conclude logically that by abandoning their poststrike jobs—assuming for the sake of argument that was the case—which are not substantially equivalent to their prestrike jobs, Williams and Johnson were abandoning the prestrike jobs, which were not substantially equivalent to the poststrike jobs? With all due respect to the court involved here, if I am, the logic escapes me. Perhaps this is why at 125 F.3d fn. 1, 202 of its decision in this case the court indicates "[n]otably, both regular run and utility drivers had to report to work by 6:30 a.m." Perhaps this is why the court, id. 208 of its decision in this case, reached the following conclusions:

> In considering the Board's argument that Beltway's misconduct caused Williams and Johnson to abandon work, we note, first that *arriving at work by 6:30 a.m. is a requirement for all Beltway drivers—both regular run drivers and utility drivers*. [Emphasis added.] The only difference between the two positions is that regular run drivers are guaranteed runs if they arrive at work on time, while utility drivers receive runs on a first come first served basis. We note, second, that Beltway's evidence shows that Williams and Johnson received runs *every day* they arrived at work on time following the strike. [Emphasis in original.] According to Beltway, all Williams and Johnson had to do in order to earn a livable wage as a utility driver was to comply with a requirement of all drivers by arriving at work on time. Thus, if Beltway's evidence is credited, their failure to earn a livable wage was attributable to their failure to arrive at work on time, not to their status as utility drivers and, consequently, not to Beltway's misconduct in reinstating them into utility driver positions. [Footnote omitted.] As noted earlier, however, Williams and Johnson assert that they did arrive at work on time and that they simply were not given sufficient runs to enable them to earn a livable wage.
>
> Because arriving at work on time is a requirement for all Beltway drivers, Beltway can only be said to have caused Williams[']and Johnson's abandonment of work if Williams and Johnson arrived at work on time and were still unable to earn a livable wage. Both the ALJ and the Board, however, declined to resolve the parties' factual dispute concerning whether Williams and Johnson arrived at work on time yet were unable to earn a livable wage or, alternatively, whether their failure to earn a livable wage was the direct result of their failure to arrive at work on time. Because resolution of the causation issue turns on the resolution of this factual dispute, we remand this issue for further proceedings consistent with this opinion.

Perhaps while the court herein agrees with the obvious, namely that the regular run and utility positions are not substantially equivalent, the court is taking the position that if both utility drivers and regular run drivers have to report at the same time and if Williams and Johnson were unable or unwilling to report for work at 6:30 a.m., it would logically follow that Williams and Johnson were unable or unwilling to report at the designated starting time for regular run drivers and, therefore, they abandoned their right to be reinstated to their former jobs or a substantially equivalent position. With all due respect to the court here, the problem with this approach, as noted above, is that it is based on erroneous understanding of the facts. As Beltway correctly points out in its position statement, as noted above, regular run drivers do not necessarily report at the same time as utility drivers, 6:30 a.m.

The Fourth Circuit, 125 F.3d at 206 of its decision herein, cites *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), for the proposition that

> an employer may properly discharge an employee when that discharge is unrelated to the employee's union affiliation or union activity, See 662 F.2d at 901. In *Wright Line*, the Board held that in order to establish that an employee was unjustly discharged, General Counsel must establish that protected conduct was a motivating factor in the employer's decision to discharge the employee. See id. at 901–02. Only after General Counsel had met that burden does the employer have to demonstrate that it would have taken that same action, even in the absence of the protected conduct, id. at 902.

With all due respect to the court involved here, a *Wright Line* inquiry is not used in reinstatement of striker cases. As noted by the Supreme Court in *Fleetwood Trailer Co.,* supra, an employer's failure or refusal to reinstate economic strikers, because it is destructive of important employee rights, constitutes an unfair labor practice without regard to an employer's anti-union motivation. With all due respect to the court involved here, a *Wright Line* inquiry is not even relevant to the matter at hand. Even assuming for the sake of argument that Beltway had cause to terminate Williams and Johnson from the nonsubstantially equivalent positions, Beltway—as the court points out—has not shown that it had a legitimate and substantial business justification for its refusal to give Williams and Johnson their still available regular run jobs on their unconditional return from the economic strike. As noted above, Beltway is not being ordered to reinstate Williams and Johnson to the utility driver positions from which they were terminated. Indeed, the relief granted regarding the terminations goes only to the

unlawful termination or the extinguishing of the reinstatement rights to the regular run positions. And, as noted above, the misconduct alleged by Beltway, even assuming for the sake of argument it is true, on its face does not rise to the level which would warrant the extinguishing of the reinstatement rights of Williams and Johnson to their regular run jobs.

While I do not believe that a *Wright Line* inquiry is relevant, it appears that such inquiry is expected by the remand. Accordingly, it is noted that Williams and Johnson engaged in union activity;[10] that Beltway knew of the union activity of Williams and Johnson; and that Beltway has demonstrated antiunion animus. Beltway unlawfully refused to reinstate Williams and Johnson to their still available regular runs when they returned from the strike and Beltway continued in its refusal at the time of the discharges which occurred about 8 weeks after its initial refusal. Counsel for the General Counsel has made a prima facie case that the union activity of Williams and Johnson was a motivating factor in Beltway's decision to discharge them. In other words, the burden of going forward has shifted to Beltway to demonstrate that it would have taken the same action, even in the absence of the protected conduct. To meet its burden of going forward Beltway relies on the testimony of its vice president of operations, Neal Wenger, and on documents which he authored.

Wenger intentionally lied under oath about a material fact when he testified before me that on the morning of August 9, 1991, four nonstriking utility drivers, Jessie Benton, Kenneth Hall, Danny Jenkins, and Jesse Newman, were individually told, before they went out on runs, that they would be offered permanent runs left open by strikers, he was going to give them a list of these runs, and they would be able to bid on them according to seniority.

Wenger intentionally lied under oath about a material fact when he testified before me that Jessie Benton signed General Counsel's Exhibit 9, a bid sheet, on the evening of August 9, 1991.

Wenger intentionally lied under oath about a material fact when he testified before me that Kenneth Hall signed General Counsel's Exhibit 10, a bid sheet, about 6 p.m. on August 9, 1991.

Wenger intentionally lied under oath about a material fact when he testified before me that Danny Jenkins signed General Counsel's Exhibit 11, a bid sheet, on August 9, 1991.

Wenger intentionally lied under oath when he testified before me about when General Counsel's Exhibit 12, a bid sheet, was signed.

And Wenger intentionally lied under oath about a material fact when he testified before me that he did not play a role in which routes were designated on General Counsel's Exhibits 9, 10, 11, and 12, especially General Counsel's Exhibits 10 and 11, which were formerly Johnson's and William's routes, respectively.

The above recitation of Wenger's lies under oath is not meant to be all inclusive. I did not find Wenger to be a credible witness and I would not credit his testimony or anything he authored unless it was corroborated by a reliable source.[11] Beltway has not met its burden of showing that it would have taken the same action against Williams and Johnson even in the absence of the protected conduct. I am not asked to rely on some objective standard like a timeclock card. Rather, Beltway, in attempting to meet its burden, relies on a subjective standard, Wenger. Again, Beltway did not meet its burden.[12]

[10] As Wenger testified, it was common knowledge that Williams and Johnson were leaders for the Union. Some of the Beltway employees who testified in this proceeding testified that Williams and Johnson were the union leaders. Johnson was the only union observer. Johnson and Williams were the only negotiating committee members who were permitted by Beltway to attend negotiating sessions during working hours and the majority of the negotiating sessions were held during working hours. They attended between 12 and 15 sessions. And as testified to by Williams and as indicated in an affidavit of Williams, R. Exh. 4, Wenger told him that he, Williams, would eventually lose his job because of the Union.

[11] As the Board noted in its decision herein, unlike the false testimony of Beltway's witnesses, the discredited testimony of Williams and Johnson did not bear on the merits of the unfair labor practice allegations. It is also noted that Johnson testified that in the past when he received a written disciplinary warning it was presented to him for his signature; and that he never saw certain written warnings authored by Wenger before they were shown to him at the hearing herein. Williams also testified that before the hearing herein he did not see certain of the documents authored by Wenger. Notwithstanding Wenger's asseretion regarding not having employees sign written warnings unless they were suspensions, if the documents existed at the time of the alleged incidents they could have been shown to Williams and Johnson. William's specific testimony that he arrived at Beltway on or before 6:30 a.m. after he returned from the strike up to the time he ceased coming in because he did not receive sufficient work is credited. While Johnson did not assert that he arrived at work on or before 6:30 a.m. every workday after returning from the strike, and Johnson conceded that he reported for work after 6:30 a.m., it was not specifically established through this witness how many times he was late and exactly when he did arrive at work. See Tr. 299 and 300. Other than a document authored by Wenger, R. Exh. 29, there is no indication of exactly when Johnson did arrive for work during this period. R. Exh. 29 raises questions in that while Wenger testified that there was a 2-week grace period after Williams and Johnson returned from the strike during which he paid them the $16 for reporting to work even if they came in after 6:30 a.m., according to this exhibit Johnson was not paid the $16 for 3 days during the second involved week when he allegedly reported at 7:15, 7, and 6:50 a.m. It was not made clear why Johnson was not paid during this grace period when Williams was paid, according to the exhibit, when he showed up for work at 7 and 6:45 a.m. on 2 days during the second week of the grace period as described by Wenger.

[12] While it was not necessary for me to reach any conclusions on it at the time, as noted in my prior decision in this matter, the Union contended that Beltway constructively discharged Williams and Johnson. The Union reiterates this argument. At the outset of the hearing herein counsel for the General Counsel referred to constructive discharge. Also, in her aforementioned Statement of Position herein counsel for the General Counsel contends that Williams and Johnson were constructively discharged. If the "why" Williams and Johnson were terminated were relevant, other than to determine whtehre the misconduct was so egregious as to extinguish their right to reinstatement to their prestrike jobs or substantially equivalent positions, then it would apparently flow that the constructive discharge argument would be relevant. That being the case, I would conclude, in agreement with the Union and the General Counsel, that Williams and Johnson were constructively discharged. Beltway unlawfully demoted them, Beltway reduced their

Since this matter is being resolved on the basis of Respondent not meeting its burden, there is no need to resolve whether Wenger, on the one hand, or, on the other hand, Williams and/or Johnson is telling the truth regarding this immaterial matter. However, if it was deemed necessary to resolve who is telling the truth, it is noted that on the one hand I have a witness who intentionally lied under oath about material facts versus a witness or witnesses who lied under oath about an immaterial fact. Obviously if I had to choose which to believe on that basis alone, I would choose the witness or witnesses who lied about an immaterial fact over the witness who lied about a material fact. If it is argued that the court's ruling makes material what I, the Board and other Unites States circuit courts of appeals believe is immaterial, then my position would be that since some believe the involved subject of the testimony of Williams and Johnson is immaterial, I would still choose against the testimony of someone who lied under oath about matters which all involved here believe are material. But again, the termination from the utility job in terms of reinstatement to that job is not relevant to the matter at hand and Beltway has not and will not be ordered to reinstate Williams and Johnson to the utility job. As noted above, the only relevant aspects of the September 1991 terminations of Williams and Johnson by Beltway is the extinguishing of the reinstatement rights to the prestrike or a substantially equivalent position and the question of whether the alleged misconduct, even if it was true, would warrant extinguishing the reinstatement rights of Williams and Johnson to their prestrike jobs or substantially equivalent positions. Beltway has not shown that it had a legitimate and substantial business justification for its refusal to give Williams and Johnson their still available prestrike regular run jobs on their unconditional return to work. Beltway has not shown that the alleged misconduct of Williams and Johnson while they worked in the nonsubstantially equivalent job, even assuming for the sake of argument it is true, rose to the level required to extinguish their right to be reinstated to their prestrike jobs or substantially equivalent jobs.

Next, the court involved herein indicates that it must be resolved whether Beltway's unfair labor practices tainted the decertification petition to such a degree that the petition cannot be relied on to show the Union lacks the support of the majority of Beltway's eligible employees. As acknowledged by the court in *D & D Enteprises*, 125 F.3d 200, 203:

> When Williams [and] Johnson . . . reported to work expecting to resume driving the regular runs they held immediately prior to the strike, they were told by Beltway officials that they had been 'replaced' because of their participation in the strike, but that they could remain employed as utility drivers. By letter dated August 12 [1991], Beltway informed its employees that some of the former strikers would not return to their pre-strike positions and had been re-assigned because they had been permanently replaced by other employees.

The court makes the following fact finding, id. at 202:

> Despite the fact that Beltway knew the strike was already over, on Saturday, August 10 Wenger offered Williams['], Johnson['s] and Randall's runs to drivers Kenneth Hall, Danny Jenkins and Jessie Benton. Hall requested that he not be placed on any route that had been Williams['] Johnson['s] or Randall's immediately prior to the strike. However, Wenger told Hall that, beginning on Monday, August 12, he wanted Hall to drive . . . [what was] Johnson's route before the strike. Hall protested . . . but Wenger and Beltway's President, Jay Davis, assigned the route to Hall despite his protestations. On that same day, Beltway gave the routes Williams and Randall had been riving immediately prior to the strike to Danny Jenkins and Jessie Benton, respectively.

As I indicated in my prior decision herein, while the aforementioned August 12, 1991 company letter to employees, as here pertinent, did not specifically name Williams and Johnson, in a unit this small undoubtedly many in the unit knew who was involved. At one point Wenger testified that he suspected that it was common knowledge among the employees that Williams and Johnson were replaced.[13] Certain of the employees who testified in this proceeding testified that when they signed the petition they were aware that Williams and Johnson were not reinstated to their prestrike jobs, and some of these employees testified that they were aware that Williams and Johnson had been terminated. Only nine of the petition signers professed complete ignorance of these matters.[14] With Williams and Johnson added back into the unit, this would mean that less than one-third of the employees in the unit, notwithstanding Beltway's August 12, 1991, above-described letter to them and Wenger's testimony regarding what was common knowledge among the employees about Williams and Johnson being replaced, claim complete ignorance of the fact that union leaders Williams and Johnson were unlawfully denied reinstatement to their still available prestrike jobs on their unconditional return from the strike and then terminated.[15] Beltway argued that

hours and consequently Beltway cut their pay. Johnson testified that before the strike he worked between 60 and 70 hours a week and after the strike he was lucky to get 4 hours a day; and that he worked 4 days between August 12 and 27, 1991, and not all 4 were full days. R. Exh. 29 shows that on August 12, 1999, Johnson received $90, on August 15, 1991, Johnson received $48, on August 23, 1991, Johnson received $90, and on August 27, 1991, Johnson received $80. But again, here the "why," except as noted above, is not relevant to the inquiry at hand.

[13] At another point in his testimony Wenger answered, as here pertinent, "yes" when asked the following question:

> Based upon the latter [Beltway's August 12, 1991 letter to employees advising them that some of the strikers' jobs had been filled permanently by other employees (Charging Party's Exhibit 4)] is it fair to say it was common knowledge by August 12 that the employees were aware that the jobs of Johnson [and] Williams . . . had been filled.

[14] The names of the nine appear in fn. 22 of my prior decision in this matter.

[15] Consideration would have to be given to the fact that some of the employees who signed the petition and professed complete ignorance of what happened to Williams and Johnson also testified that they did not see these employees around after the strike, and that while Benton claims complete ignorance regarding what happened to Williams and

most of the petition signers (not the total number of employees in the unit) were unaware of the unlawful conduct when they signed the petition, and the court, id. at 209 of its decision herein, finds that "testimony suggest[s] that *many* of the petition's signatories were unaware of Beltway's misconduct."[16] (Emphasis added.) The court concluded, id. at 209, that this fact, in addition to the "absence of any evidence suggesting a connection between employee disaffection from the Union and Beltway's misconduct" with, as here pertinent, Williams and Johnson, should have moved the Board, at a minimum, to apply its own multifactored analysis in assessing the validity of Beltway's good-faith defense to its withdrawal of recognition of the Union, rather than dismissing Beltway's defense out of hand. Again, even if one were of a mind to credit all nine of the petition signers who professed ignorance, in the situation at hand, this, either considered alone or in conjunction with the alleged absence of any evidence suggesting a connection between the employee disaffection from the Union and Beltway's misconduct with regard to Williams and Johnson, does not warrant changing the prior conclusions reached by the Board herein.

The court indicates 125 F.3d at 210 fn. 6 of its decision herein as follows:

> Notably, if the Board determines on remand that Williams and Johnson should be reinstated, the very fact of heir unjust termination might render the decertification petition invalid even without the change in the number of eligible employees. In that case, there was an ongoing unfair labor practice when the decertification petition was signed in late November 1991 (i.e. Williams and Johnson had been unjustly terminated and their reinstatement was required). An ongoing unfair labor practice of that magnitude could cast sufficient doubt on [the] decertification petition so as to make it invalid. See *NLRB v. Williams Enter[prise]s, Inc.,* 50 F.3d 1280, 1288 (4th Cir. 1995) (company may not avoid duty to bargain with union unless it can demonstrate that its unfair labor practices did not cause the union's loss of support); *Columbia Portland Cement Co. v. NLRB,* 979 F.2d 460, 462–65 (6th Cir. 1992) (employer's failure to reinstate has long lasting effect on validity of decertification petition).

There were ongoing unfair labor practices at the time of the petition, namely, Beltway's refusal to reinstate Williams and Johnson to their prestrike jobs or substantially equivalent positions without a legitimate and substantial business justification, and Beltway's extinguishing of Williams' and Johnson's right to be reinstated to their prestrike jobs when Williams and Johnson had not engaged in the kind of misconduct which would warrant such action.

Unremedied unfair labor practices of the extent and seriousness involved here are likely to have undermined the Union's authority generally and influenced the employees to reject the Union as their bargaining representative. Unlike *Master Slack Corp.,* 271 NLRB 78 (1984), which the court cites 125 F.3d at 209 of its decision herein, the unfair labor practices here did not occur 8 or 9 years before the decertification petition. Rather, here the unremedied unfair labor practices commenced on August 12, 1991, with Beltway's unlawful refusal to reinstate the strike leaders to their former jobs, which were still available when they unconditionally offered to return to work. The unremedied unfair labor practices continued with Beltway's unlawful termination of the reinstatement rights of Johnson and Williams on September 9 and 16, 1991, respectively. The signatures on the decertification petition are dated November 25, 26, or 27, 1991. In other words, the employees began signing the petition received herein a little over 5 weeks from the last of the above-described unfair labor practices and 15 weeks from the first of the above-described unfair labor practices. Unlike *Master Slack Corp.,* supra, Beltway has not offered reinstatement to Williams and Johnson. Unlike *Master Slack Corp.,* supra, the petition here was tainted by the involved unremedied unfair labor practices. In *Master Slack, Corp.,* supra, the employer posted a notice to the employees agreeing to take the action ordered by the Board. Here there was no such order at the time of the decertification petition. But Beltway did nothing before the decertification petition to rescind its August 12, 1991 letter to employees, which letter indicates "[s]ome employees on strike will not be able to return to their former jobs because permanent strike replacements have been hired or other employees have been permanently moved into their positions."

As pointed out in *Olson Bodies, Inc.,* 206 NLRB 779 (1973), which the court cites 125 F.3d at 209 of its decision herein:

> The serious character and lasting impact on employees of such unfair labor practices cannot in our view, be too strongly emphasized. Discriminatory discharges of employees because of their union activities strike at the very heart of the Act. Their lasting impact, including the likelihood of their causing employees to defect from unions and their tendency to undermine a union's majority status by discouraging union membership and deterring organizational activity, is well settled.

The matter at issue here involves an unlawful refusal to reinstate employees to their prestrike jobs or substantially equivalent positions without a legitimate and substantial business justification, and the extinguishing of the employees' right to be reinstated to their prestrike jobs when it has not been shown that the employees engaged in the kind of misconduct which would warrant such action. As pointed out in a case cited by the court here, *Columbia Portland Cement Co. v. NLRB,* supra, direct evidence of causation is not required; it need only be demonstrated that the company's unfair labor practices had a reasonable tendency to erode the Union's support thereby precluding the company from relying on the good faith defense. And as pointed out in *Olson Bodies, Inc.,* supra at 780:

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Johnson, Benton replaced one of the other strike leaders after the strike, Thaddeus Randall.

[16] In the preceding sentence of this paragraph in its decision the court indicates that "*many of Beltway's eligible employees* professed ignorance of their employer's misconduct." (Emphasis added.) Obviously "many of Beltway's eligible employees" in the situation at hand is not the same as "many of the petition's signatories." As noted above, while nine employees clearly amounts to "many" in terms of the number who signed the petition, the nine are less than one-third of the involved eligible employees.

> Serious unremedied unfair labor practices . . . tend to produce disaffections from a union and thus remove as a lawful basis for an employer's withdrawal of recognition the existence of a decertification petition.

The Board concluded in *Fabric Warehouse,* 294 NLRB 189, 192 (1989), as follows:

> It is well established that, where an employer has engaged in unlawful conduct tending to undercut its employees' support for their bargaining representative, the employer cannot rely on any resulting expression of disaffection by its employees because its asserted doubt of the union's majority has been raised in the context of its own unfair labor practices directed at causing such employee disaffection. *Hearst Corp.,* 281 NLRB 764 (1986), affd. mem. 837 F.2d 1088 (5th Cir. 1988). Further, such misconduct will bar any reliance on a tainted decertification petition even though a majority of the petition signers profess ignorance of their employer's misconduct. Id. at 765.

In 1990 the United States Court of Appeals for the Fourth Circuit affirmed, without a published opinion, this Board decision. *Hancock Fabrics v. NLRB,* 902 F.2d 28 (4th Cir.1990). The quote in this paragraph was quoted in my prior decision herein.[17] And the court cites this case in its decision herein. For an employer to claim good-faith doubt as to a union's majority status it must first refrain from committing serious unfair labor practices of the type committed here.[18]

Accordingly, I find that Beltway violated Section 8(a)(1) and (3) of the Act by unlawfully failing and refusing to reinstate, as here pertinent, Jimmy Williams and David Johnson on August 12, 1991, to their former positions of employment and by unlawfully discharging Johnson and Williams on September 9 and 16, 1991, respectively; and that Beltway violated Section 8(a)(1) and (5) of the Act by withdrawing its recognition of the Union on April 1, 1992, and by refusing since then to recognize and bargain with the Union as the exclusive collective-bargaining representative of the involved unit of employees.

## ORDER ON REMAND

It is ordered that the findings of fact, conclusions of law, and Order set forth in my prior Decision and Order herein be, and they are hereby, affirmed with respect to Respondent D & D Enterprises, Inc. d/b/a Beltway Transportation Company (a) unlawfully failing and refusing to reinstate, as here pertinent, Jimmy Williams and David Johnson on August 12, 1991, to their former positions of employment and by unlawfully discharging Johnson and Williams on September 9 and 16, 1991, respectively in violation of Section 8(a)(1) and (3) of the Act; and (b) withdrawing its recognition of the Union on April 1, 1992, and by refusing since then to recognize and bargain with the Union as the exclusive collective-bargaining representative of the involved unit of employees thereby violating Section 8(a)(1) and (5) of the Act.

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[17] It should be noted that the Board, in fn. 7 of its decision in *Hearst Corp.,* supra, cites *Master Slack Corp.,* supra, where then-Chairman Dotson and Members Dennis and Hunter affirmed the decision of an administrative law judge to dismiss the complaint in its entirety. With respect to the effect of the unlawful conduct on employee morale, organizational activities, and membership in the Union one need only note that the drive to decertify the Union here began only after Beltway committed the involved unfair labor practices.

[18] In its position statement Beltway argues that even if the decertification petition were tainted issuance of a bargain order is unwarranted in view of the passage of time and employee turnover. It should be noted that here the Order set forth below does not establish a new obligation of Beltway to recognize and bargain with the Union. Rather, the Order requires restoration of the status quo ante—the bargaining relationship between the Union and Beltway—and is based solely on the violations of Sec. 8(a)(5) of the Act. As noted above, in my opinion Wenger intentionally lied under oath when he testified before me about when certain of the striking employees were replaced. These are material facts. Beltway's position regarding the job of utility driver being substantially equivalent to the job of regular run driver was frivolous. Delays in the resolution of this case can be laid squarely at the door of Beltway. It appears that Beltway fully appreciates the statement of William Ewart Gladstone that "justice delayed is justice denied." As noted above, the Board has already addressed Beltway's argument regarding employee turnover.